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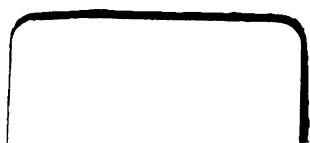
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THE

JOURNAL OF JURISPRUDENCE.

THE SHERIFF COURTS.

The History and Present Constitution of the Sheriff Courts of Scotland. By ROBERT ROBERTSON, Esq., Advocate, Sheriff-substitute of the County of Stirling.

(Continued from page 587, Vol. VII.)

MR ROBERTSON, in the historical sketch which forms the first part of his pamphlet,¹ sets forth the various statutes which, subsequent to the Jurisdiction Act, have defined the position and prescribed the duties of the Sheriffs and their Substitutes. The enumeration

¹ An answer to criticisms on Mr Robertson's history in our last number, appeared in the *Stirling Observer*, 10th December 1863, which has been printed separately, with large additions, and circulated by Mr Robertson, in such a manner as to justify the inference that he is the writer of the original article. The style of this reply is so utterly unbecoming, that we leave it, without further remark, to the certain condemnation of all who may happen to read it. But we have a word to say of its unfairness. We had attributed to Mr Robertson at least two historical errors: 1. In denying that the Sheriff is a royal-depute; and 2. In denying that that he is the true representative of the old Sheriff, or *vicecomes*. Now, any contradiction of our views should certainly have referred to, and, if possible, refuted the authorities by which we supported them; i.e., Erskine and Sir Islay Campbell, whose words we again quote: 'The officer denominated Sheriff-depute, in the Jurisdiction Act, continues in effect to hold the same situation which the Sheriff occupied under the Scottish monarchy. He is now, as the Sheriff was then, an immediate deputy of the king.' The reply in question, however, scouts this idea, as if it were an unfounded 'pretension' of our own, without once alluding to those distinguished lawyers on whose authority—as against the violent assertion of Mr Robert Robertson—we were and are content to rely. The repetition of blunders, without any attempt to justify them, even though enlivened by vehement abuse of your opponent, is not a style of controversy either very seemly in itself, or very well calculated to serve 'the single object of bringing out truth.'

of the statutes is accurate enough, but a gloss is thrown over the whole narration ; and it concludes with blunders which do credit even to Mr Robertson's imagination. The story of the statutes may be told, without any gloss, very shortly. By the Jurisdiction Act, Sheriffs were required to reside four months in their counties. During their absence the formal business of the Court was discharged by resident Substitutes. As the legal necessities of the country increased with her increasing wealth and prosperity, the judicial work which devolved on these Substitutes grew in extent and importance. Accordingly, in 1826, a statute was passed, requiring that such assurance of legal knowledge as is afforded by a man being an advocate, or a writer to the Signet, or a solicitor before the Supreme Courts, or a country practitioner of three years' standing, should be an indispensable qualification for the office of Sheriff-substitute ; and in order to ensure the existence of such qualification, the consent of the Lord President and the Lord Justice-Clerk was required to the appointment of any Substitute by the Sheriff. From the first, however, most of the Sheriffs evaded the requisition of four months' residence ; while others, again, erred on the side of extreme obedience, and never left their counties at all. This latter irregularity proved, in the opinion of competent judges, very much the worse of the two. Sir Islay Campbell—one of the most eminent men who ever sat on the Scotch Bench—entertained, and often expressed, a strong conviction of the mischief arising from the system of 'country-gentlemen Sheriffs.' Lord Cockburn was wont to declare, with his characteristic force of expression, that 'their heads became filled with prejudices, and emptied of law.'

Say the Commissioners of 1818 : 'By the 29th section of the Jurisdiction Act, it was provided that the Sheriffs-depute should be resident within their several counties for four months in every year. We think it necessary to explain, that a considerable relaxation has taken place in the observance of the rule thus laid down ; and that in the greatest number of cases, the Sheriffs-depute are now in use, without adhering to the exact period specified in the Act, to visit their jurisdictions at such times and for such continuance, as they in their discretion think necessary in the circumstances of each sheriffdom.'

The Commissioners, however, did not consider this deviation from the exact statutory requirement as at all blameworthy, or as arising from any other motive than an anxious desire on the part

of the Sheriffs-depute to adopt whatever course might most conduce to the efficient discharge of their duties. On the contrary, they express their opinion that the Sheriffs-depute 'ought always to be chosen out of those members of the Faculty of Advocates who are in constant attendance in the Supreme Courts of law, and must, on this account, have their residence in Edinburgh.' Similar views were enforced by the Commissioners of 1834; and so strongly did experience teach their correctness, that a statute making attendance at the sittings of the Supreme Courts compulsory on the Sheriffs-depute, was passed by Lord Advocate Murray in 1838.

This statute is regarded by Mr Robertson as the Magna Charta of Sheriff-substitutes; and it may be well, therefore, to see what it actually did. It enacts that the Sheriffs (with the exception of the Sheriffs of Edinburgh and Lanark)¹ shall be in habitual attendance on the Court of Session; and instead of residing in their counties for four months, they are required to hold eight courts during the year, and also to 'attend personally within their sheriffdoms upon all necessary and proper occasions.' It enacts that the Sheriff-substitutes shall not be absent from their jurisdiction for more than six weeks during the year, or for more than two weeks at any one time; it requires the same consent from the heads of the Court for the removal of that officer by the Sheriff, as were before required for his appointment; and it provides that on the death or resignation of the Sheriff, the Sheriff-substitute shall continue in office without the necessity of any appointment from his successor. Lastly, the statute of 1853 requires the Sheriffs to hold only four—in some counties three—sittings during the year. This provision is apparently a relaxation of the statute of 1838, but it is not so in reality; for the 'sittings' here required may, and generally do, embrace several of the 'ordinary Courts' required by that statute; and besides, must take place at intervals of not less than six weeks. Now, these are the sole provisions of the Legislature since the Jurisdiction Act, which have introduced any change in the relative positions of Sheriffs and their Substitutes; and it cannot be denied, that from these Mr Robertson has contrived to deduce corollaries of the most startling kind.

Mr Robertson assures his readers, that the Sheriff-substitute is no more the Substitute of the Sheriff than 'the Justice-Clerk is the clerk of the Justice-General;' and that he is as truly independent of

¹ Maintaining in this point the provisions of 3 Geo. IV. c. 49.

his superior, as 'the Master of the Rolls is of the Lord Chancellor.' He would have done well had he remembered Dogberry's caution against comparisons. In what respect is the Master of the Rolls subject to the Chancellor? His judgments are reviewed by the Chancellor, but that is all. Still more unfortunate is the comparison taken from our own Courts. Does the Justice-General appoint the Justice-Clerk? Can he dismiss him? Does he even review his judgments? These things are trifles; but, like straws, they indicate the direction of the fiery blasts of Mr Robertson's injured self-importance. But in the following statement he gets beyond all bounds. 'The ordinary Sheriff Court,' he says, 'is now the Court of the Sheriff-substitute alone; the Sheriff-depute cannot act in the ordinary Court (beyond pronouncing a decree in absence) to any effect or purpose whatever.' Now, it is to be observed that Mr Robertson does not put his case that the Sheriff does not generally act in the ordinary Court, or even that as a matter of practice he never does so, but that he *cannot* do so,—that such action on his part would be illegal. This position runs through his whole pamphlet, and, that there may be no mistake about the matter, we will quote other passages to the same effect. Thus, a few lines farther on, he says, 'The public, in every case where an appeal is competent in the Sheriff Court, is now entitled to have the decision of two distinct judges; and till a judgment is pronounced by the Substitute, an interlocutor by the Depute is *incompetent*.' In another place, Mr Robertson tells us that he has been very precise and special in the information he has condescended to bestow on the ignorance of the world, because he found that incorrect statements had been circulated in regard to the position of the Sheriff-substitute. Among these was the statement, 'that the Sheriff-substitute had no separate existence from the Sheriff-depute, who could, if he thought fit, betake himself to his county, replace himself in the chair both of the ordinary and Small Debt Courts, and still discharge every duty and function of the office. To these statements I at once replied, that the Sheriff-depute could do nothing of the kind; that he had by statute ceased to be the resident judge of the sheriffdom; that he was now an intermediate appeal judge merely.' We cannot but admire Mr Robertson's promptitude and self-reliance—'I *at once* replied'—but it is to be regretted that such admirable qualities should have led him into error so gross. There can be no room, however, for the excuse of having

been led astray by noble impetuosity; for in this small pamphlet we have the same error repeated in almost every page. The words of the Act of 1838, which allows the Sheriff-substitute lengthened leave of absence, with 'the consent, in writing, of the Sheriff of the county for the time being, who shall be bound, in the event of giving such consent, *either to attend personally during the absence of such Substitute*, or to appoint another fit person as Substitute to act in his stead,' might have suggested to Mr Robertson some doubts of his theory. Instead of that, however, they elicit the following comment:—'Unfortunately, this considerate provision, so far as regards the personal attendance of the Sheriff-depute, which in the earlier days of the office would have been most valuable, *cannot* now be carried out, and for this plain reason, that the Sheriff-depute, being by statute merely an intermediate judge of appeal, in so far as regards the highest class of cases of his Court (the ordinary action roll), *can do nothing as to these in the first instance*; for, until a deliverance has been given by the Sheriff-substitute, his interference is *illegal and incompetent*.' These passages bring out, we think, with sufficient clearness the position which Mr Robertson maintains; and the ignorant M.P.'s., and 'otherwise well-informed persons,' whom he has so kindly undertaken to enlighten, will be somewhat astonished to hear that this position is utterly erroneous.

That the Sheriff, as an appeal judge, discharges his most usual and most important judicial functions, is perfectly true. But that is not the question which Mr Robertson has raised. He has asserted distinctly that the Sheriff *can* discharge no other functions—that as a judge in the first instance, his action is incompetent; and in asserting this, Mr Robertson has given to the world a statement which is absolutely the reverse of truth. A Sheriff has precisely the same powers in this matter at the present day as he has had at any given time since the Jurisdiction Act became law. Did Mr Robertson ever read sec. 46 of 16 & 17 Vict., c. 80, enacting that the Sheriff, on his small debt circuit, shall, in addition to holding the Small Debt Court, 'despatch as much of the ordinary business as may be ready for adjudication?' And if he has, we wonder greatly what he considers the words 'ordinary business' to mean—or, indeed, how he construes the section at all. The Sheriff is therein required to hold his sittings 'for the discharge of the judicial business of the county,'—without one word limiting the

business to appeal cases,—and ‘such sittings are to continue until the causes ready for trial or hearing, when such sittings commence, be disposed of.’ Now, though this phraseology is not very felicitous, it plainly means, and has been in practice interpreted as meaning, that appeals, hearings on closed records and on concluded proofs, closing records, taking proofs, and motions of all kinds, come before the Sheriff at these sittings. But confident assertion is never wanting to Mr Robertson. In direct contradiction at once to the language of statutes and the facts of practice, he maintains that the Jurisdiction Act provided for one resident judge alone; that the system of two judges, with an appeal from the inferior to the superior, is of ‘comparatively modern introduction;’ and that the statute of 1838 made the superior an appeal judge only. He is wrong upon all points. To say that the Jurisdiction Act enacts, that ‘there shall be in every county a *resident* judge of legal education, and a member of a legal body of at least three years’ standing, with a substitute for the performance of merely formal duties;’ and to describe the ‘judicatories thus formed as presided in by a single *resident* judge of legal education, but who was only a judge in the first instance, and who possessed no appellate jurisdiction whatever,’ is to misrepresent that Act grossly. The Act did not make him a resident judge—it only required his residence for four months: it did give him an appellate jurisdiction; for in virtue of its provisions alone has he, from that time to this, exercised the power of reviewing the judgments, as well as of superintending the work, of his Sheriff-substitute. From the very first, litigants were in use to resort, in the first instance, to the Sheriff-substitute—partly, doubtless, because he was on the spot, partly to secure despatch, and partly in order to obtain a double judgment without facing the expense of the Court of Session. The Act of 1747 most surely conferred an appellate jurisdiction on the Sheriff—a jurisdiction of which litigants more extensively availed themselves, as increasing prosperity brought with it multiplied disputes, and so made apparent the great value of the right of appeal. ‘With the exception of a few cases,’ say the Commissioners of 1818, ‘when the Sheriff-depute is at all times or chiefly resident within the sheriffdom, the various duties of the office are in the first instance exercised, and its immediate responsibility incurred, by the Sheriff-substitute; and different parts of the business, both ministerial and judicial, are necessarily, on account of the instant despatch which they require, conducted

exclusively by him. *In all cases of judicial procedure, however, an appeal by petition to the Sheriff-depute is not only competent, but in daily use.* And it is curious to remark, that a Parliamentary Return for the three years immediately preceding 1823, informs us that litigants took their cases before the Sheriff-substitute in the first instance—thus preserving to themselves the power of appeal—even in counties which happened to be blessed with a resident Sheriff. The object of the statute of 1838 was to perfect this appellate jurisdiction, stamped as it was with the approval of experience. It appeared to the framers of that Act, that what should be required from the chief judge of the county was judicial work, and not otiose residence; and further, that a man did not become a better lawyer by degenerating into an ordinary Justice of the Peace. Accordingly, as we have before said, they substituted for four months' compulsory residence an obligation to hold a certain number of courts in the year; and they required the Sheriff to be in regular attendance during the sitting of the Court of Session—thereby doing what they could to ensure that in the discharge of his duties as an appeal judge, he would have the advantage of being familiar with the practice of the Supreme Courts, would be kept up with the latest aspects of the law, and would enjoy the privilege of being able to profit by the advice of his professional brethren. But the statute made no other or further change in his position. The Sheriff now, as before 1838, can take his seat on the bench at any time—can see how the records are made up, and how the pleadings are carried on—can hear and decide cases in the first instance. We shall hereafter show that many good results flow from this double power, from this combination of the functions of an original and an appeal judge. But our present business is to express our wonder at Mr Robertson's ignorance of these things. It is true that Sheriffs do not very frequently hear and decide cases in the first instance. But it is equally true that they do so in many instances; and that they have it in their power to do so whenever they please. And it is this last position which Mr Robertson has denied: he has disputed, not the frequency, but the competency of such procedure. Had he not done so repeatedly, as the passages we have quoted show, we should have doubted the possibility of a blunder so complete. How great soever the ignorance of history and of law which may be reasonably expected from Mr Robertson, it is hard to credit him with ignorance of matters of fact within the

scope of his own experience ; and few people, we believe, have better reason to be aware of the power of the Sheriff to relieve his Substitute of the whole work of the Court, than the Sheriff-substitute of the Eastern District of Stirlingshire, when the late Lord Handyside was Sheriff of that county.

At the beginning of his pamphlet, Mr Robertson states that he has published 'these pages as the answers of a witness in reply to the questions of an examiner, to whom no sane person would venture to make a statement, the accuracy of which could be successfully called in question ;' and at the close of it he again assures the accomplished gentleman whom he addresses, that he has given him 'a detail of facts, the correctness of which, I believe, will not be disputed.' We have certainly ventured to dispute Mr Robertson's facts, and we are strangely mistaken if we have not done so successfully. And if this be so, how can we adequately condemn the levity of this man ? He writes with the plain object of bringing into disrepute a jurisdiction of long standing and widespread popularity, and of exalting his own office upon its downfall ; and his whole argument is based on a total misrepresentation of the historical origin and present position alike of the office which he would destroy, and of the office which he would raise up. We would not press against him his own statement, that 'no sane person' could be guilty of such conduct ; but we must at least qualify his assertion, that he has 'given the evidence of a witness, not the lucubrations of a special pleader.' What the lucubrations of a special pleader may be we do not profess to understand : but it is clear to us that Mr Robertson has pleaded his case with a fervour which has soared far beyond the region of fact ; and that if he has given the evidence of a witness at all, it has been the evidence of a witness very ignorant, very confused, and not very candid.

Thus far we have endeavoured to show that Mr Robertson has no claim whatever to be heard on this subject, at once from his want of knowledge and his want of temper. But the subject itself is one of much importance, and deserves discussion, altogether irrespective of this writer's errors or violence. What the interests of the community in this matter may be, is a question which merits our best consideration. Is it for the public benefit that the present system should be retained ?—that is the sole point worthy of discussion, and to that point our attention shall, in the next number of this Journal, be directed and confined.

COMPARATIVE CRIMINAL JURISPRUDENCE.

A General View of the Criminal Law of England. By JAMES FITZJAMES STEPHEN, M.A., of the Inner Temple, Barrister-at-Law, Recorder of Newark-on-Trent. Macmillan and Co. 1863.

(Continued from page 581, Vol. VII.)

Is this country as in England, we look upon trial by jury not only as 'the cardinal point in criminal law,' but as one of the great bulwarks of our political and social life; and we would rightly consider any attempt to introduce any other system as antagonistic to all ideas of personal liberty. But in France it is otherwise. In that country trial by jury is a modern institution; it is no older than the Revolution, and has never become part of the life of the French people. We must not, therefore, regard their system too exclusively from an English point of view; and if their own inquisitorial system suits the genius of the people, we must not be too ready to condemn it. Yet there are some points in it which call for criticism. The accused has not fair play, and ideas of fair play are not subservient to any national idiosyncrasies. Is it right, for instance, that the accused should be debarred from all means of preparing his defence to meet his accusers? Is it right that his counsel should not be allowed to cross-examine the witnesses, or that the laws of evidence should be disregarded? But here again we must be careful as to our interpretation of the laws of evidence. In this country there are certain well-known and fully recognised principles by which the laws of evidence are regulated. The most important of these may be reduced to four general maxims:

Evidence must be confined to the point at issue.

The best evidence must be given, or its absence must be explained.

Hearsay is not competent evidence.

No one is obliged to criminate himself.

These four principles, in some form or another, have guided English criminal procedure, and indeed their civil procedure also, since the time when the jurors ceased to be witnesses, and became the judges, and our own criminal procedure from even an earlier date. In France, however, whether these rules exist or not, the

practical application of them is unknown. The point at issue occupies a very secondary part in the trial of a suspected criminal. Matter that appears to us to be totally irrelevant to the case, not unfrequently bears more weight, or at least as much weight as direct evidence of the crime. In the case of Léotarde, for instance,¹ Bazergue, a trunkmaker, is adduced to declare that, when he heard that the murdered girl was missing in the convent, he told his informant that if Cecile had entered the monastery she would not leave it alive. 'I had,' he said, 'a sort of presentiment; and I added that, if she remained, their interest alone would be enough to prevent her from being allowed to leave it alive.' 'This,' said the President, 'may be called a rather prophetic appreciation if the fact is true.' Would we consent to such evidence going to a jury? Again, the whole life of the prisoner is brought under review; and the minutest circumstances of his manhood, youth, and even childhood are scrupulously investigated. In fact, a suspected criminal too often is bound to show a clean bill of moral health from the day of his birth till the time when the crime was committed; and even then it is not impossible that the sins of his progenitors may be cast into the balance against him. Nor is it enough that the prisoner's long-distant antecedents and those of his parents should be brought up. It not unfrequently happens that the early history of witnesses is investigated. Comte, who gave evidence against Léotarde, was thus rigidly examined.² The prosecution explored his whole life with the greatest care. They found out that, seven years previously, he had seduced his wife's sister; and a bookseller named Alazar, to whom she was engaged, was called to prove that he had broken off his engagement in consequence, and to produce a letter from her (she had been dead six years) excusing her conduct. Hereupon Comte wished to give his version of the affair, but the President at last interfered. 'Mon Dieu,' he exclaimed, 'Ou cela nous menera-t-il?' The question should have been asked long before. What would be the feelings of some of our justiciary judges, if an advocate-depute were to adduce such evidence at a circuit trial!

As for hearsay evidence, it is seldom disregarded. Nor is it even sent before the jury 'with a mark.' Often it is the strongest, sometimes the only evidence that is produced.³ François Lesnier, for instance, was convicted and sentenced on evidence that could not be

¹ Cited by Mr Stevens.

² P. 449.

³ P. 474.

dignified by any higher name than hearsay, and much of that rested upon the oath of a single witness. The rule, again, that no one is obliged to criminate himself, has no place in French jurisprudence. On the contrary, the whole end and object of a criminal trial before a French Court is to secure the self-crimination of the accused. From the moment of his arrest the whole machinery of the 'hierarchy,' and all the energies of the Procureur-Impériale, the Juge d'Instruction, the Procureur-Général, and their staff of subordinates—commissaries of police, agents of police, gendarmerie, and the other inferior officers—are directed to one point: to wring a confession from him. They keep him in solitary confinement, it may be for days, weeks, months, or even years, liable at any moment to be confronted by any witness that may be adduced, and to be examined, brow-beaten, insulted, threatened, or duped, into a confession. They satisfy their own minds of the prisoner's guilt, by working on his mind till they force him to confess, sometimes, as in a late case that created a great sensation in every community in Europe, to confess to a crime of which he or she is as innocent as the accusers. 'You gave a number of versions during the instruction,' said the President to Joanon at his trial in the affair of St Cyr;¹ 'you make new ones to-day.' Answer: 'They said so many things to me—they bothered me so dreadfully (*ils m'ont si péniblement retourné*) that I do not know what I said.' In reality this is not much to be wondered at: it is no proof of his guilt—indeed it may almost be construed on the side of innocence. There is nothing of the honesty of a public examination about such a system of procedure. It is a moral torture, more cruel and oppressive than the physical torture of the wedge that was in practice before the Revolution. 'The judge of instruction,' observed Léotarde, in answer to a question put to him by the President,² 'and the Procureur-Général treated me as a man who could not be innocent. They browbeat me (*violentaient*); they tortured me. It was not till I came to this prison that I found a judge and a father. You, M. le Président! yes, you alone have not tormented me. The others treated me as a poor wretch already condemned to death. . . I declare that I have not lied before justice. There is nothing but sincerity in my words. If there are some contradictions in my depositions, it is owing to the solitary confinement which I have undergone. Ah! gentlemen, if you knew what solitary confinement is! Yesterday I saw a scene which pained me.

¹ The Affair of St Cyr, p. 453.

² P. 441.

I saw a man who was being brought out of solitary confinement to hear the mass. It was terrible ! he was as thin as a skeleton. How he must have suffered !'

Cruel and tyrannical though this may appear in our eyes looking from a personal point of view, it is even more intolerable when looked at legally, for not only is the accused compelled to criminate himself, he is debarred from all chance of proving his innocence. He is not permitted to communicate with his friends, and thus is unable to prepare his defence. He does not know what witnesses are to be called against him, he may not see his counsel, and his counsel may not always see his own witnesses, much less may he cross-examine the witnesses for the prosecution, except through the President. The prosecuting officers take the witnesses for the defence as well as for the prosecution under their charge, and they exercise all their ingenuity in getting up a case against the prisoner from the mouth of the exculpatory witnesses, if they cannot secure it by the prisoner's own confession. No doubt this is fair enough when the laws of evidence, as we understand them, are applied, and if the prisoner's witnesses can be proved false, so much the worse for him. But as we have shown, these laws are not regarded ; on the contrary every look and every motion of a witness is interpreted according to the whim or the impression of the examining magistrate ; and if he forms an unfavourable estimate of the witnesses' demeanour, that estimate is considered as direct evidence against the prisoner.

From this brief criticism of French procedure, it is obvious that, however willing we may be to consider it in a liberal spirit, there are points in it which cannot but revolt against our views of right and justice. It is obvious that the accused has not fair play, and that from the moment of his arrest he is looked upon as a condemned man ; and however desirable this may be for the community, it is harsh and tyrannical upon the individual.

We now turn to our own system ; and when it is compared with either the French or English, we may, without much self-complacency, congratulate ourselves on possessing a system that combines the good of both with few of the evils of either. It is unnecessary here to give such a sketch of the working of the Scotch system, as has been given of the English and French systems, because most of our readers are intimately acquainted with it. It is enough to say shortly, that it possesses the advantages of both

the litigious and inquisitorial systems, and that owing to the perfection of the machinery, there is no country in Europe in which crime so seldom escapes investigation, and in which the innocent are so seldom subjected to criminal prosecution. The public prosecutor and his staff of subordinates, established in every county, secure the discovery of crime, and afford protection and redress to the injured party at no expense to any individual, and at no annoyance except that of examination as a witness; and the facilities given to the accused to meet the charge preferred against him both before and after committal—before committal through the agency of an impartial judge in the person of the Crown counsel; and after committal, by the absolute liberty allowed a prisoner to prepare his defence—secure him fair play, and give him every opportunity to prove his innocence.

It is true that our machinery is not perfect. In some respects the accused may have too great facilities afforded to him for escape, as, for instance, the enormous loophole given by the Not Proven verdict, and by the fact that he has the last word with the jury. But in other respects he has much to contend against. Nothing that we would tolerate in this country can be harder upon a man than the manner in which his declaration is, in too many instances, taken from him. The presiding judge, no doubt, has a great deal in his power in the way in which he deals with a prisoner and the prosecuting officer. He may permit the prosecutor to deal hardly with the prisoner, and to torment him and treat him with as much severity as a *Juge d'Instruction* would treat a prisoner in France; or he may act with moderation, and compel the prosecutor to do so likewise. There are some of our sheriffs who, to their credit be it said, are most scrupulously particular in insisting on fair play being given to the accused; but this is not the rule. In too many cases the procurator-fiscal is allowed to act in all respects as one bound to bring the accusation home to the suspected man; and without giving him any insight as to what the witnesses may have said against him, to perplex him with question after question, before he knows or appreciates the charge that he is expected to meet. It is needless to say that this system of taking a declaration from a prisoner is anything but an opportunity afforded him of explaining suspicious circumstances. In such cases it is the French system, with scarcely any modification. The prisoner is carried before a learned body of experienced officials, who have already sat in judg-

ment upon him, and formed a prejudice against him, founded on some theory inconsistent with his innocence. He is warned vaguely that what he says may be used against him, and then he is turned into a judicial target, and shot after shot is fired into him, until he becomes so worn out with questionings, that he is willing to answer whatever may be required of him, and those answers are committed to writing, not precisely as he gave them, but in such a manner that they not unfrequently take the form of a confession. The nominal object of this moral inquisition is to give a man a chance of clearing away suspicious circumstances, and of establishing his innocence; the result is not unlikely to cause a weak and nervous man to conduct himself in such a manner as to raise a presumption of guilt, when in reality he is innocent. There is much greater fairness in the English system. In that country the witnesses are examined, not in private, but in presence of the prisoner, who may cross-examine them if he chooses; and after their examination the full depositions are read over to him, and then he is asked whether he wishes to say anything or not. That is an honest, straightforward way of dealing with a man who is accused of crime. It gives him, if he is innocent, an opportunity of proving his innocence. He is not perplexed or worried in the dark by questions that he does not understand, but he explains his conduct or reserves his defence according to his own pleasure.

There is yet another matter in our criminal procedure that we would do well to modify, and that is the overscrupulous care with which the Crown keeps the precognitions of witnesses to itself. Why should we not adopt the English system of allowing the prisoner to get a copy of the Crown evidence against him at some trifling price? That would be an inestimable advantage to the poorer class of prisoners, who cannot be at the expense of paying money to agents and counsel to prepare their defence. As the cases of the poorer prisoners are now managed, there is almost no chance for them. Guilty or not guilty, it comes to the same thing. Poors' agents no doubt there are, but professional men cannot be expected to work for nothing; and a man must be very zealous in his profession, or be destitute of other work, if he will bestow adequate trouble on a case that will not bring him any recompense. As matters now stand, counsel comes into Court, an indictment is thrust into his hand, the prisoner is in the dock, the public prosecutor calls his witnesses one after the other without any statement of what he is

going to prove; and neither the prisoner, nor his counsel, nor his agent know anything about the case, until it is time for the counsel to address the jury. The counsel may go on one theory, and then upon another, as the evidence comes out. He may take up the valuable time of the Court by cross-examining witnesses on matters which at first sight appear to have some bearing on the case, but which, as the proof goes on, turn out to be totally irrelevant to the point at issue. And as for the prisoner, he is generally in such complete ignorance of the charge against him, that in nine cases out of ten, when he is asked whether he is guilty or not, he may answer in all sincerity, in the celebrated words of the Irish criminal, 'How can I tell, your honour, until I hear the evidence?' Now if the accused were entitled to a copy of the Crown precognitions—for the copy of the warrant for incarceration, and the petition on which it was granted, to which by the Act 1701 he is entitled, are of no greater service to him in the preparation of his defence than the names and designations of the witnesses in the indictment—much waste of precious time would be saved. His counsel would direct him whether he should plead guilty or not, and many hopeless trials would thus be prevented. If the case went to trial, his counsel would know the story of the accusation, and would direct his cross-examination only to the points that bore upon the defence, and protracted trials would thus be curtailed. Such is the English system, and it acts well; for our objections to the English procedure have no reference to the trial, but to the proceeding anterior to the trial. And surely if such a custom is in existence in a country where that prosecution is carried on almost entirely by private persons, how much more should it exist in this country, where the whole power and the whole wealth of the Crown is employed upon the conviction of an individual? It would be much fairer to the prisoner, it would be much better for the Court, it would be a great matter for the counsel, it would tend to help the innocent, and it would not necessarily facilitate the escape of the guilty. These two points—the manner in which the prisoner's declaration is in many instances wrung from him, and the overscrupulous anxiety on the part of the Crown to deprive the prisoner of the benefit of seeing the evidence collected against him—seem to be the two most prominent defects on the side of hardship to the prisoner in our procedure, and the Not Proven verdict may or may not be on the side of mercy. We do not propose to enter upon that question here; neither shal

we raise the much-vexed point of previous convictions, saying in passing, that if it be considered fair to adduce evidence of good character in behalf of a prisoner, it would seem equally fair to adduce evidence of bad character: both having equal relevancy to the point at issue. But with these defects, the two first of which might easily be remedied, it may safely be asserted that the combination of the two principles upon which criminal procedure is founded, such as we have in Scotland, results in the most perfect system of criminal procedure at present extant in any country.

A VOICE FROM THE WILDERNESS ON THE COURT OF SESSION BILL.

The Court of Session Bill, 1863. A Voice of Warning. With Appendix of Letters published in the *Scotsman*. By a Law Agent. Edinburgh: Bell and Bradfute.

UNDER this absurd title, a 'Law Agent' has published an equally absurd jeremiad upon the Court of Session Bill, in three pages octavo, with an Appendix of Letters formerly published in the *Scotsman*. The pamphlet is evidently a fragment from an unpublished effusion in the spasmodic or quasi-prophetical strain which has lately come into fashion. It may please the author to play the 'lion's part,' and try to frighten the profession with his 'voice of warning;' but why should he make himself ridiculous by informing us in the next line that he is not a lion at all, but a worthy, and, we daresay on other subjects, most sensible 'Law Agent'? The explanation may perhaps be connected with that condition of mental bewilderment which can alone account for the perpetration of the following introductory paragraph:—

'The late Court of Session Bill, with all the suddenness of a comet in the heavens, plunged into sight towards the close of last session of Parliament. After flaming about for a time, it was withdrawn; and we were all hopeful that the unwelcome stranger had for ever disappeared, when back it has come—on, let us trust, its backward flight to the unknown regions from whence it came.'

In plain English, if the author will pardon the translation of his ideas into the hated Anglican terminology, the Lord Advocate having presented a measure of Court of Session reform to the House of Commons, intimated with his usual courtesy to the profession that the Government would give them a year to consider it;

he kept his promise, and the Bill was withdrawn, with an intimation that it would be introduced in the following session. Our 'Law Agent,' however, persists in looking upon the Bill as a portent; and, following out his fanciful style of illustration, he endeavours to connect it with the approaching decadence or humiliation of his country.

'From the accession of James I. to the present day,' he says (p. 3), 'the ancient desire to subjugate Scotland has taken other shapes; and it is impossible not to observe that there is a disposition in some quarters to carp at our law and legal institutions.' After quoting a passage from Lord Bacon to prove that the intercourse between England and Scotland would naturally result in an assimilation of their national laws and usages, the author sensibly observes, that 'against this secret, silent influence it would be as difficult to guard as against the effects of the ceaseless action of the sea upon the shore;' but, becoming spasmodic again, he adds, that 'it is reserved for our day to consummate the process by a change and mighty inundation.' He is very angry at the Lord Advocate and Sir George Grey for asserting in the preamble of their measure that the practice and mode of procedure in the Court of Session 'may be rendered more simple, certain, and expeditious,'—words which, with most people, might pass for harmless truism, but which are fraught with mischief in the view of a 'Law Agent,' in whose opinion simplicity, certainty, and expedition, mean neither more nor less than certain ruin to his class; or, as he elsewhere (p. 12) more elegantly expresses it, the being 'improved off the face of the earth.'

It is not so much the character of the proposed amendments in our system of practice, nor even their novelty and extent, which has alarmed a 'Law Agent,' but rather the principle of 'change' or innovation which it embodies. Like Lord Eldon, his one article of political faith is, a horror of 'innovation;' a convenient creed, which saves him the trouble of forming an opinion upon the merits of any new measure by confining the discussion to the inquiry whether the measure is new. A Law Agent has no objections to any possible Court of Session Bill which will leave matters precisely as they are, but he will not tolerate a measure which professes as its object, simplicity, certainty, and despatch; and for this reason, that these requisites, however excellent in themselves, notoriously do not exist under the present system of procedure;—whence it follows, that

their introduction is to be resented as innovation. The one principle which a 'Law Agent' deprecates, is the principle of change,— 'change from our admirable and cherished forms of judicial procedure to the forms of another country; which, however well they may be adapted to the genius of the people of that country (as I have little doubt they are), are alien to our notions, are new to our practice, and are even unintelligible to our minds (p. 5).'

Having wound up his readers to the requisite pitch of intensity by a suitable apparatus of tropes and figures, and solemnly appealed to Lord Bacon and the Eldonian doctrine of 'no innovation,' a 'Law Agent' in conclusion lifts up his voice, and gives utterance to his warning in the following terms:—'If we have any regard for our interests, any love for our country, or a just appreciation of its laws and institutions, we must, in the most marked and effective manner, oppose this uncalled-for, this revolutionary Bill!'

Here a 'Law Agent' collapses. When he reappears in the Appendix, it is no longer as a prophetic 'voice' vaticinating to his friends and fellow-countrymen, but as a real law agent, writing plain but not very good prose upon practical realities, such as records, country agents' accounts, and the debate rolls and counsels' fees. Once or twice, when the fit is on him, he surprises us by spasmodic references to the highwayman's demand of 'Stand and deliver,' which formulates his interpretation of an English writ of summons, or by allusions, as at page 12, to a certain madman or drunken driver, who is supposed to be turning on the steam and driving everybody to—Bethell, we suppose, or perhaps a worse place. But, not to be unjust to 'a Law Agent,' he is on the whole rational in the Appendix; and to it accordingly we turn for an exposition of his objections to the Court of Session Bill, and his sentiments on the subject of Professional Reforms in general.

The epistolary form is not very favourable to that sort of systematic exposition which is desirable in dealing with so technical a subject as procedure; and the author of this pamphlet has not professed to follow any very exact order in the arrangement of his ideas. We are therefore under the necessity of dealing with these letters as with one of those articulate condescendences on which the author loves to expatiate. From a mass of irrelevant observations, we shall perhaps be able to extract some issues which have reference to the Court of Session Bill, and to these our attention will be confined.

Letter I. is, to a large extent, just the voice of warning in another

form. It expresses the author's horror of innovation, and boldly affirms the absolute perfection of the existing forms of procedure. On the latter point the author has, perhaps unconsciously, perpetrated so ludicrous a parody of the Duke of Wellington's famous declaration against parliamentary reform, that we cannot resist the temptation of placing the two passages in juxtaposition :

'He was fully convinced that the country possessed at the present moment a legislature which answered all the good purposes of legislation, and this to a greater degree than any legislature had ever answered in any country whatever. *He would go further and say, that the legislature and system of representation possessed the full and entire confidence of the country, and deservedly possessed that confidence. He would go still further and say, that if at the present moment he had imposed upon him the duty of forming a legislature for any country, he did not mean to assert that he could form such a legislature as they possessed now, for the nature of man was incapable of reaching such excellence at once; but his great endeavour would be to form such a description of legislature which would produce the same results.*'—*Hansard's Debates*, 3d series, i. 52.

'There had been no demand from any quarter for the amendments which this Bill is intended to effect, and which, if passed into law, would produce an unexampled revolution in the procedure of our Supreme Courts; and, without venturing to affirm that our present forms of procedure are absolutely perfect, I may fairly say that they have proved so admirably adapted for the great end of all forms—the attainment of justice—that not only is there no complaint on that score, but the highest satisfaction with them everywhere prevails; scarcely even excepting from the general approval those very few but sometimes troublesome speculative men who are always imagining that they can devise systems better than those which have stood the test of years, and are as familiar as household words to the people.'—*Voice of Warning*, p. 7.

Letter II. begins with some further preliminary objurgations on the subject of simplicity, certainty, and despatch, and is followed by a prediction, amusing when read after the event, that 'the Bill will raise a storm of indignation from Gretna Green to John O'Groats.' In the view of the author, the propositions of the Court of Session reformers are vitiated by four radical fallacies. The first of these consists in the absurd idea that it is necessary to obviate delays of justice. The author is of opinion that the Court of Session Bill will rather tend to add to the existing causes of delay; but so hard is it to please him, that, instead of commending the measure for this excellent quality, he converts it into a new ground of accusation. He complains (p. 13) that the provisions of the Bill tend to a further occupation of the time of the Court with formal motions and single bills. How this should be, he does not attempt to explain; and a candid opponent might at least have admitted that the provisions for making up records without motion, the suppression of intermediate reclaiming notes, the abolition of enrolment for decree in absence

(which the author himself recommends), and the power proposed to be given to the Court of obviating defects of form by amendment at any stage of the proceedings, might have a contrary tendency. He complains of the time occupied in delivering judgment *viva voce* in the Inner House,—the interruptions to counsel in pleading,—the simultaneous sitting of six Courts without a corresponding supply of ‘experienced counsel’ to plead in them,—and last, but not least, of the acceptance of dinner engagements, during Session, by the leaders of the Bar. Does a ‘Law Agent’ seriously mean to suggest that such incentives to delay are remediable by the Legislature? Is the Court expected to prohibit dinner parties on Fridays by Act of Sederunt? Is there to be a compulsory distribution of cases amongst juniors, in order that we may train up an additional number of experienced counsel? If not, little good can result from the attempt to intrude such questions into the discussion of a measure of legislative reform. The only practical suggestion which a ‘Law Agent’ offers, in addition to those in which he has been anticipated by the Lord Advocate, is the adjustment of ‘the daily hours of the Outer and Inner House sittings in such way as that the Bars should not come into collision.’ How is this to be done? At present each of the six Courts sits, on an average, five hours a day. Supposing that the work could be compressed into four, and that all the Court were to sit at different times, the diurnal period of twenty-four hours would be exhausted in accomplishing the necessary ‘adjustment.’ We fear that the ‘experienced counsel’ are not sufficiently patriotic to consent to an arrangement which would speedily deprive the country of their services altogether, if the Legislature were so deaf to considerations of humanity as to insist on carrying out the author’s suggestion. A preferable course, in our opinion, would be to regulate the hours of business so that all the courts, both Outer and Inner, should sit *during the same hours*. This would probably lead to some such arrangement among the leaders as now exists amongst those of the Chancery Bar, by which the senior counsel confine themselves to one court of first instance. Such an arrangement would give them two additional hours for preparation at home, and thus obviate the necessity for that renunciation of the pleasures of the table which a ‘Law Agent’ requires from the gentlemen whom he proposes to honour with his patronage.

The author’s second objection is (p. 15), that the Bill would indirectly necessitate the greater employment of counsel; as an

example of which, he refers to section 47 of the Bill as originally introduced, providing that debates in the Outer House shall be heard continuously, and that in the absence of senior counsel the junior shall be called upon to reply. That this might, in important cases, lead to the employment of three counsel on each side, we do not deny. But it would not necessarily have that effect; and if the junior is competent to the discharge of his professional duties (which, with deference to the opinion of a 'Law Agent,' we shall assume to be the fact), there would be no injustice to the litigant in enforcing the proposed regulation. A 'Law Agent' may perhaps consider it presumptuous to suggest that practising juniors are, on the average, as well skilled in their profession as the procurators in the Sheriff Courts of Edinburgh and Glasgow; and yet cases of as great value to the litigants as the majority of those which occupy the time of the Judges in the Outer House, are argued in the Sheriff Courts by one procurator on each side, and no complaint has yet been made regarding the conduct of debates in these courts. On the contrary, we believe that litigants have perfect confidence that their cases are presented for the consideration of the Sheriffs in a manner that is entirely satisfactory. We observe that, in a 'Postscript' to his pamphlet, a 'Law Agent' recommends the introduction of the English Chancery system of counsel confining themselves to one bar. Holding that opinion now, why does he republish his silly insinuation, that section 47 was prepared in the interest of counsel? What objection can there be to the hearing of debates continuously, if the counsel are to be in constant attendance at one bar, and ready to speak at a moment's notice, as he himself recommends? (see p. 45). Nay, more, what becomes then of the necessity of 'arranging the sittings so that the bars should not come into collision?' Had a Law Agent forgotten Letter II. when he penned the 'Postscript;' or does he imagine that the only kind of consistency required of a pamphleteer upon Court of Session Reform is consistency in opposition to the object of his hostility?

3dly, The author complains of the introduction of what he is pleased to describe as 'the forms of the Small Debt Court into Court of Session practice.' If by this he refers to the summons, it may be sufficient to observe, that the existing form of summons in petitory actions gives no more information than a summons in the Small Debt Court. It informs the defender of the amount of the claim, and cites him to appear; the rest is mere verbiage. If he

refers to the written pleadings, we have only to point to the provisions of the Bill in refutation of the random assertion. Written pleadings are not permitted in Small Debt actions. The new form of pleading proposed for the Court of Session (which, we may remark, has already received the approbation of the sub-committees of two of the professional bodies appointed to report upon it), not only permits, but requires that every ground of action and defence should be made matter of record. The pursuer is required (sections 28 to 33)¹ to set forth his ground or grounds of action in a condescendence, stating the different grounds in distinct articles, in order that they may be separately answered; care being taken at the same time to discourage the introduction of mere details of evidence and quotations from deeds. The defender is required (sections 44 to 48) to answer every statement of a cause of action, by either objecting to the relevancy, or denying, or stating a counter case on the assumption of the verity of the pursuer's statement. The pursuer may then reply (sections 49, 50) under the same conditions; and the defender may rejoin (section 51). Revisal, no doubt, is prohibited, as it is considered that a party who has put forward a reasonable ground of action or defence has no need to alter it; but power is given to the Court to rectify unintentional error by an amendment of the record. Such is a brief outline of the proposed form of pleading. It may be better or it may be worse than the existing method; but it has been found in the experience of the sister country to answer the purposes of disclosing the grounds of action and defence; and it has the further advantage of disclosing them in such a form as to raise issues of law and of fact, which confessedly the existing form of record does not do. This at least we may affirm, that ignorance—inexcusable in a writer professing to criticise the Bill—can alone palliate so gross a misrepresentation as is implied in the comparison of its provisions with those of the Small Debt Act.

Without stopping to consider the author's objections to the power of amendment proposed to be given to the Judges—a power which, as exercised in England, has put an end to that class of discussions on points of form, which the author of this pamphlet, in common with all law reformers, professes to regret—we proceed to the last

¹ We refer for convenience to the sections of the Bill as amended in committee; but in this respect no material change has been made in the provisions of the original Bill with respect to petitory actions.

of his objections, 'the proposed substitution of English forms and terms of law for our own.' The introduction of English forms is assuredly undesirable, if we assume with the author that our own forms are superior, or as good. But this is really assuming the whole question. We have in former articles pointed out the defects of our existing system of procedure, and shown how these might be amended by engrafting upon that system the improved forms introduced into the practice of the English Courts by the Common Law Procedure Acts. The main object of the Lord Advocate's Bill is to extend to Scotland the benefit of those legislative improvements. The author of this pamphlet does not attempt to prove that the changes which he so sweepingly condemns are unsuitable to the spirit of our laws and practice, but rather seeks to raise an outcry against them by an appeal to national prejudices which every rational reformer must condemn. We decline to enter into a controversy with him upon the ground which he has selected, and willingly leave him in undisturbed possession of the applause which his declamation may evoke from that section of the public whose horizon is bounded by the Tweed, and who think they can settle all questions of law amendment by the cry (which the author, with whimsical inconsistency, borrows from the *English Barons*), *Nolumus leges Angliæ mutari*.

Letter III. does not appear to call for any special examination. It consists, in the main, of a narrative of the forms presently used in making up a record, and in proceeding to trial or debate in ordinary actions. The existing procedure the author affirms to be 'intelligible, simple, and most eminently calculated to ensure justice;' adding, that 'to this simple and admirable condition—the maturity of pleading—we have in Scotland arrived by the slow experience of centuries' (p. 23). In support of his opinion that our system is perfect, and all English importation objectionable, he appeals to the authority of the learned Judge who introduced jury trial into Scotland. 'Innovation,' we are told, on the authority of Lord Chief-Commissioner Adam, 'is always a subject of most grave consideration.'

There needs no ghost, my Lord, come from the grave to tell us this.

But the grave consideration which the learned Commissioner gave to the matter did not prevent him from devoting the best years of his life to the naturalization of English jury process amongst us. By referring to the introduction to the Commissioner's work

on Jury Trial, a 'Law Agent' will find, that in the opinion of that learned Judge, the only hindrance to the success of jury trial in Scotland was our system of pleading. There can be no doubt that Lord Commissioner Adam was most desirous to introduce the jury practice of England in its integrity; and there can be as little doubt, that if he had been allowed to supplement the provisions of the Jury Trials Act by an Act extending the common law system of pleading to Scotland, he would in a large measure have realized those expectations which were doomed to disappointment. He failed, because professional prepossessions in favour of the articulate system of pleading could not be overcome; but his writings bear witness to his reluctance to fetter jury trial with the impediment of adjusted issues, rendered necessary by the defects of our system of articulate pleading, and his consciousness that, under that system, trial by jury laboured under an insuperable disadvantage.

Letter IV. is not so much an argument against the Court of Session Bill as a protest against all Procedure Bills whatever, which a 'Law Agent' regards as alike objectionable and unconstitutional. The author gets up a little extra indignation on the score of the Bill in question having been introduced by the Lord Advocate, whose position and power towards the profession, he says, are such as to 'deprive it to a great extent of free speech' (p. 32). A 'Law Agent' adds:—'The circumstance of his being practically the only Scotch lawyer in the House of Commons to whose impartial opinion in all such questions the House is inclined to appeal, renders it unfitting that any measure of that kind should in any way emanate from himself.' Is this simplicity, or mere confusion of ideas? Does the author really think that a Government measure should not be introduced by that member of Government whose position and legal attainments will ensure for it respectful consideration in the House of Commons? It is quite intelligible that a 'Law Agent' who objects to the Bill should desire it to be entrusted to incompetent hands; but it is surely too much to complain that the friends of the measure take their own way of recommending it to the attention of Parliament. In the next sentence a 'Law Agent' perhaps approaches the sublime from that angle in which it is said to touch upon an opposite quality. 'Upon principle,' he says, 'I would hold it to be as unconstitutional or objectionable for a Lord Advocate to originate a Bill to regulate judicial procedure, as it would be for the Queen to originate a Money Bill!'

From these hitherto unexplored regions of constitutional law, we are suddenly brought down to the consideration of the dimensions of counsels' fees. A 'Law Agent' must really pardon us if we are unable to follow him in these rapid transitions. The logical connection between Money Bills and refreshers is not obvious to the uninstructed legal capacity. The discovery of the missing link of association may be an interesting problem, but we cannot afford to devote the whole of the Christmas Recess to its investigation; and as the matter at any rate lies beyond the province of legislative interference with procedure, we must ask permission to pass at once to his fifth and last letter, in which the author adverts to the publication of the amended Bill,—if indeed consideration of that letter is necessary, in view of the author's admission that he has not yet 'had leisure to ascertain' the contents of the Bill. A 'Law Agent' will not condescend to discuss the amendments—which he regards as an aggravation of the original offence—and he holds in contempt the pusillanimous behaviour of those of his professional brethren who are willing to examine before condemning. 'I trust,' he observes, 'all such weak-minded reasoning will be avoided now, and that the committees to be appointed by the several bodies will be able to see their way to taking up at once with boldness and vigour the position of objecting to the Bill *in toto* as unnecessary and mischievous.' We are afraid that a 'Law Agent' here shows signs of losing his temper; though why he should—seeing that in his pamphlet he has all the argument his own way—we are at a loss to understand. We entreat him to reconsider this last hasty resolution. To condemn without a hearing, is a bad sign in a writer who professes to be an authority upon judicial procedure. On reflection, a 'Law Agent' may come to see that it is not altogether beneath his dignity to peruse a measure upon which the eminent men in both branches of the profession, constituting the committees to which he refers, have bestowed a large share of their time and attention. It would at least be more respectful to his readers to conceal the ignorance which he thus ostentatiously avows; and if his object is victory, he is more likely to attain it by 'hitting straight out' than by thus wildly beating the air. We venture to hope that a 'Law Agent' may yet be induced to consider the amended Bill upon its merits; and if the result should be a further publication of his sentiments, we undertake, as far as our circulation extends, to give

them publicity,—believing that in so doing we may be instrumental in promoting the cause of Court of Session Reform, by showing how weak and inconsequential are the arguments upon which the opponents of the Bill advocate its rejection.

SKETCH OF A SCIENTIFIC CLASSIFICATION OF RIGHTS.

EVERY student of jurisprudence must have remarked that, in treatises upon positive law, the utmost diversity has prevailed with respect to the mode of arranging and dividing the subject as a whole. So much is this the case, that although a general perception of the affinities of certain classes of rights has led to these classes of rights being grouped together by almost every writer, yet no two writers agree as to the limits of the primary divisions of the subject, or as to the matters which properly fall to be treated under those divisions. Certain rights of a more complex or abstract character are associated sometimes in one class, sometimes in another, according to the fancy of the author, and apparently without any better reason for the association than a vague notion of fitness or convenience of arrangement. In no one of the works of general jurisprudence which we are most accustomed to consult, is there the slightest indication that the author had attempted to treat his subject according to exhaustive categories; nor can we discover that these authors, while professing to divide their subject in an ordinary manner, were conscious that they were in reality confounding several distinct principles of division.

The rules for the logical division of a subject, according to Archbishop Whately (*Logic*, p. 93), are three:—1st, Each of the parts, or any of them short of all, must contain less, *i.e.*, have a narrower signification, than the thing divided. 2d, All the parts together must be exactly equal to the thing divided; therefore we must be careful to ascertain that the *summum genus* may be predicated of every term placed under it, and of nothing else. 3d, The parts or members must be opposed, *i.e.*, must not be contained in one another; *e.g.*, if you were to divide the word ‘book’ into poetical, historical, folio, quarto, French, Latin, etc., the members would be contained in each other; for a French book may be a quarto or octavo, and a quarto French or English, etc. ‘Therefore,’ continues the Archbishop, ‘you must be careful to keep in mind the principle of division with which you set out; *e.g.*, whether you begin dividing books according to their matter, their language, or their size, all these being so many

cross divisions. And when anything is capable, as in the above instance, of being divided in several different ways, we are not to reckon one of these as the true, or real, or right one, without specifying what the object is which we have in view; for one mode of dividing may be the most suitable for one purpose, as, *e.g.*, one of the above modes of dividing books would be the most suitable to a bookbinder, another in a philosophical, and the other in a philological view. . . . When you have occasion to divide anything in several different ways—that is, on several principles of division—you should take care to state distinctly how many principles of division you are making, and on what principle each proceeds.’

Proceeding upon these rules, which are as old as Aristotle, though perhaps nowhere so clearly enunciated as in the treatise to which we have referred, it is easy to see that there are four different ways or principles of division according to which the subject of law may be divided or classified. We confine our attention here to private law, —that is, the law of individual rights; but we believe that the methods of division which we are about to indicate will be found to be equally applicable to most of the other branches of systematic jurisprudence.

The object proposed being the systematic exposition of the subject of individual rights, let us consider how many simple general terms or notions enter into the composition of the complex general term, ‘right.’ Each of those, of course, will furnish a distinct principle of division. Analysis shows that there are two main and two subordinate principles of division. A right may be considered as anything capable of being acquired or possessed. We may, therefore, either divide law as a whole, according to the objects capable of being acquired,—*e.g.*, land, moveables, money, labour; or we may divide it according to the nature of the acquisition,—*e.g.*, by agreement, voluntary gift, descent, etc. According to the former principle of division, in which objects are taken as the basis of qualification, a subordinate principle of division is furnished by the extent and quality of the right,—*e.g.*, absolute property, life interest, lease, loan, etc. According to the second principle of division, viz., that depending upon the acquisition, the source or cause of acquisition furnishes the basis of classification; and a subordinate classification may be based on a consideration of the mode in which the acquisition or possession is secured,—*e.g.*, by occupation, by grant (conveyancing), or by legal diligence.

These four modes of dividing the subject of legal rights may be thus briefly indicated : 1st, Division according to the several objects of acquisition ; 2d, Division according to the quality of the right acquired ; 3d, Division according to the source or title of acquisition ; 4th, Division according to the mode of securing and enforcing the right.

If the reader has apprehended the purpose of our introductory observations, he will perceive that the whole subject of positive law may be arranged according to any one of these four principles of division—the other grounds of division being taken as the basis of subordinate classification ; and, according to the method of division employed, any given description of rights will be brought successively into relation with others whose affinity to it depends upon some common quality contained in the general term which constitutes the basis of classification. This may be illustrated by considering the case of some particular right, *e.g.*, the right of a tenant in an agricultural lease. According to the classification of the objects of acquisition, this particular right would fall within the division ‘heritable rights.’ Viewed in that connection, it would be the aim of the jurist to exhibit the points of resemblance and also the points of difference betwixt the interest of a lessee of heritage and that of a proprietor or liferenter. According to the second principle of division, the tenant’s right would be considered as a particular case of a right of possession for a limited term (location); and the specialties which distinguish the location of heritable property from hiring of moveables, loan of money, affreightment, etc., would be exhibited in the best manner by grouping these different rights as members of a more general class. According to the third principle of division, the source of the tenant’s right would be referred to agreement or contract, and a comparison would be instituted in regard to the nature of the obligation betwixt this contract and other modes of acquisition, *e.g.*, succession, assignation, diligence, etc. Leases might also be considered with reference to specialties in the mode of acquisition.

The example which we have selected at random is suggestive of an important practical observation, which is, that, as the object of systematic jurisprudence is to exhibit rights in their mutual relations to each other, that object cannot be attained by an exclusive adherence to any one principle of classification. In order to apprehend the relations of one description of rights to the others with which it

has affinities, we must resort to as many principles of division as possible ; and although, in so doing, we must necessarily treat only of the same rights under a different order of arrangement, this is not to be regarded as repetition, because the object of a systematic treatise is not to teach law as an arbitrary collection of rules, but to exhibit these rules in their natural relations to one another. Every distinct arrangement which brings into view a separate combination of rights bound together by a common principle, and governed by the law of analogy, forms in reality an integral part of the subject considered systematically ; and the omission to deal with an important class of rights under any of the recognised principles of division, indicates as truly a want of completeness in the work, and may tend as much to obscure the reader's perception of the relations of legal rights, as the entire omission to deal with the right in question in the treatise.

Many departments of law, and some of these among the most important, can be exhibited in their natural relations, and with completeness, under some one of the principles of division to which we have referred. Where this is the case, it will of course be unnecessary for the systematic writer to introduce in a less convenient form what had already been the subject of detailed explanation in another part of the treatise. In order to explain the relations of this right under a different order of arrangement, a brief notice may be sufficient, accompanied by a reference to the more detailed exposition in another part of the treatise. The example already given will explain our meaning. The location of heritable property, as a subject of detailed exposition, will be best explained under a division of rights according to the object of acquisition, because the leading distinctions recognised in this branch of the law have relation to the nature of the object of the right, *e.g.*, whether urban or rural, agricultural, pastoral, mining, sporting, etc. In treating of location in connection with the quality of the right, *i.e.*, as the right of possession for a limited term, it will be sufficient merely to indicate those considerations which distinguish contracts for the location of real property from contracts of hire and affreightment, referring to the classification of rights according to the object for a detailed exposition of the law of landlord and tenant.

The nature of the Classification of Rights which we recommend will be better understood by the aid of the following tables, in which we have arranged the more familiar departments of the jurispru-

dence of Scotland according to the two leading methods of classification. In the first, the principal divisions are founded upon the nature of the property, while the subsidiary divisions indicate the quality of the interests taken in it. In the second table, the classification is founded upon the modes of acquisition, which are intended to be considered *seriatim* with reference to the various rights previously noted in Table I. The tables are given merely as sketches of what is intended; but they will probably be found to contain enough to enable the reader to refer any particular right to its proper place in the system.

TABLE I.

The Elementary Subjects of Property are four in number:—
1. LAND: 2. CORPOREAL MOVEABLES: 3. MONEY (including Credit): 4. LABOUR.

By the combined application of two or more of these elements, interests of greater complexity are evolved which become the subjects of property.

We distinguish six species of interests in property,—which sometimes receive different names, according as they arise out of land, moveables, money, or labour. These are—1. Life interest; 2. Usufructuary interest for a limited term; 3. Burdens affecting the property of others; 4. Possession as a security for debt; 5. Possession on behalf of another; 6. Fee or reversionary interest, or what remains after deducting all partial interests in the subject held by others. To these we may add Property, or *plenum dominium*, where the entire right is vested in one person. Again, there may be more than one person having interests of the same description in a subject; *e.g.*, in the case of *pro indiviso* rights of property, and in the feudal tenure of superior and vassal, where each proprietor has a fee to the extent of his own interest.

I. Land and its accessories.

1. Life Interest.
2. Tenancy.
3. Prædial Servitudes, Real Burdens and Rentcharges.
4. Right to Land in Security.
5. Factory (onerous), Trust (gratuitous).
6. Fee, Reversionary Interest.

II. Corporeal Moveables.

1. Life Interest of Moveables.
2. Use of Moveables let on hire.
3. Innominate conditions of possession.
4. Pledge, *ex facie* absolute Transference.
5. Factory; Possession of Agent; Trust.
6. Fee, Reversionary Interest.

III. *Money and Credit.*

1. Interest of a Fund for Life.
2. Interest of Money lent.
3. * * *
4. Guarantee.
5. Deposit of Money.

 IV. *Labour.*

1. Service for Life.
2. Service, *Locatio operarum*, etc.
3. * * *
4. Advances guaranteed by contract.

The same varieties of interest may, of course, be carved out of mixed property, *e.g.*, literary and artistic property (in which the value of the corporeal material is inconsiderable in comparison with the labour expended on it), or shares in a mercantile business (a description of interest into which all the four elements of property frequently enter).

It does not appear to have been ever distinctly propounded, that any of the *limited* interests mentioned in the table is itself capable of being dealt with in law as a *new element* of property, from which again interests limited in any of the above forms may be carved. In order to its being so dealt with, it is only necessary that the interest in question should be constituted by writing, so as to be recognised as a substantive incorporeal right. Thus *tenancy*—which originally is but a limited use of land—if it is constituted by a written lease, becomes in its turn a species of property, and may be either life-rented, sublet, burdened, assigned in security, or conveyed in trust. Interests of a similar description may be carved out of a loan of money when constituted by a bond, or out of the value of services, as in the case of an assignation of the emoluments of an office for life. The recognition of the principle that limited interests in property are developed by writing into substantive incorporeal rights, subject to the like limitations, will very much facilitate the scientific classification of rights.

TABLE II.

For our present purpose it is unnecessary to pursue the classification of rights according to their mode of acquisition, further than to the extent of the most general divisions. It appears to us that the logic of the subject requires the recognition of three distinct stages in the transmission of property, although we believe the continental jurists will only allow of two. These are, 1st, the obligation to convey, which gives the acquirer a right to demand the specific property, but without putting him in immediate possession; 2d, *De presenti* conveyance, by which he becomes proprietor, and may complete a title of possession without resorting to a court

of law ; 3d, Tradition, or what is equivalent to tradition in the case of incorporeal rights, by which he is not only put into possession, but acquires a title in competition with third parties preferable to that of a prior assignee who has not taken delivery. The three stages, however, are not found in all the modes of transmission ; of which we may distinguish four : viz., (1.) by contract ; (2.) by voluntary conveyance ; (3.) by descent ; and (4.) by diligence. There is no expressed obligation except in the case of acquisition by contract ; for though in voluntary deeds, such as in wills or settlements, we speak of the heir's obligation to convey, this is rather a form of speech than the expression of anything like a proper contract between the heir and donee. We may, therefore, classify rights according to the mode of acquisition in the following manner : 1. Obligation, including contract and liability *ex facto* ; 2. Acquisition by Conveyance, including onerous and gratuitous conveyances ; 3. Acquisition by Succession ; 4. Acquisition by Diligence ; 5. Tradition, including intimation and infeftment.

Each of those heads may be divided into sub-sections corresponding to the four elements of property ; and these again may be divided according to the interest acquired. We may illustrate this by selecting one or two sub-sections from each of the principal divisions, and observing the order in which the rights pertaining to it arrange themselves. Under division (1) 'Obligation,' sub-section Money, we have, first, obligations relating to life interests, including life assurance (where the insurer has a life interest in the premiums and an equivalent for the sum assured), and annuities (where the annuitant takes a life interest in exchange for present payment). Next in order come Contracts for the loan of money upon interest ; under which head we would classify the whole series of banking operations ; because, whatever form these may take, whether draft, letter of credit, bill of exchange, deposit receipt, or cash account, the substance of the transaction always is, that the bank either receives money or the equivalent of money from its customers, or advances money to them. The form of the instrument would doubtless be an important basis of classification in a treatise on conveyancing, but in a classification of rights, it is manifestly subsidiary to the object of the contract. Pursuing the same subject, we have, in the third place, cautionary obligations or guarantees, and fire and marine insurance, in which the obligation of the insured being merely contingent, is of a different nature from that under-

taken in the case of life insurance. To complete the subject, it would be necessary also to deal with the subject of the obligations which might be contracted with respect to each of these species of rights considered as property.

Under the *second* grand division of our second Table would fall to be included everything relating to the form and effect of uncompleted conveyances. This would not admit of the same minute subdivision as the former; but taking again the subject of Money Obligations as an example, it would be necessary here to distinguish and explain the requisites of regular assignments of bonds, assignment of negotiable instruments by indorsation, and assignment of the public funds by transference in the books of the Bank of England.

The *third* division, Succession, would admit only of a twofold partition: since Labour is not inheritable, and there is no difference in regard to descent between Moveables and Money. The subject thus divides itself into 'Heritable' and 'Moveable' Succession. As the same subject may be moveable as to succession, although heritable *ex sua natura*, e.g., land vested in trustees subject to a direction to sell, it would be necessary here also, after explaining the rules of heritable and moveable succession, to review the various species of rights, and to point out any specialties affecting their transmission by legal descent.

The *fourth* division, 'Diligence,' arranges itself naturally under the four heads of Real Diligence, Poinding, Arrestment, and Imprisonment, corresponding to the sub-sections Land, Moveables, Money, and Labour.

Under the final grand division, 'Tradition,' the whole subject would be generally reviewed with special reference to the mode of completing a title such as would protect the property against claims by third parties. Under the first sub-section, Land, the subject of infeftment (or its equivalent, registration), would be dealt with. Under the head Corporeal Moveables, the necessity of actual delivery to give a secure title, and under the head Money, the efficacy of intimation as equivalent to delivery in the case of incorporeal rights.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

HAMBLETON v. HAMBLETON'S TRUSTEES.—Nov. 25.

Trust—Power to Advance.

By trust-disposition and deed of settlement, the late Mr and Mrs Hambleton conveyed their whole estate to trustees for family purposes. The fifth purpose of the trust was as follows:—‘Fifthly, After the death of both of us, the said Moses Hambleton and Jane M'Master, otherwise Hambleton, the said trustees shall hold the whole estate, heritable and moveable, which shall belong to us, or either of us, to and for the use and behoof of William Innes Hambleton, our only child, and the lawful issue of his body, and shall apply not only the annual produce thereof from time to time, but also the whole, or such part of the capital or principal sums as they may think proper, for the maintenance and education of our said son, or for the purpose of fitting him out for any profession or occupation which may be chosen by him, with the consent and approbation of our said trustees, or for any other purpose which may appear to them to be for the benefit of our said son.’ The seventh purpose of the trust was as follows:—‘Seventhly, After the deaths of both of us, and failing our said son without lawful issue, our said trustees shall (in case no other destination be made by the survivor of us, which he or she shall have full power to do) make payment of the free residue of our whole estate hereby conveyed to the treasurers for the time being of the Baptist Missionary Society, and the Society in Aid of the Moravian Missions, both of London, and that in equal shares, to and for the use and behoof of the said Societies respectively, and the receipts and discharges of the said treasurers shall be a sufficient exoneration to our said trustees in the premises.’ Mr and Mrs Hambleton being now dead, their son has brought the present action, calling upon the testamentary trustees to hand over to him the whole proceeds of the trust-estate, on the ground that, on his surviving his father and mother, the trusters, the other destinations in the trust-deed flew off, and he, as sole beneficiary, was entitled, on his attaining majority, to bring the trust to an end.

The Lord Ordinary (Barcuple), *inter alia*, found ‘that, according to the directions of the trust-disposition and settlement of the deceased Moses Hambleton and Jane M'Master or Hambleton, his wife, under which the defenders are the sole accepting and surviving trustees, the defenders cannot be required, contrary to the fair exercise of their own discretion, to pay or make over to the pursuer any part of the capital of the trust-estate. Finds that the defenders, in the exercise of their discretion, have decided against paying or making over to the pursuer any part of said capital ;

and that no relevant or sufficient grounds are stated in this action for impugning this decision as not being a fair exercise of their discretion.'

The pursuer having reclaimed, the Court to-day adhered to the Lord Ordinary's interlocutor; Lord Deas, however, intimating an opinion that it was very far from clear what meaning the trustees meant to express, or what was the exact legal effect of their settlement as executed.

SHAW v. EDINBURGH AND GLASGOW RAILWAY CO.—Nov. 29.

Reparation—Tender.

The pursuer in this action, who was a clerk in a writer's office in Falkirk, was one of the sufferers in the railway accident at Winchburgh. He brought an action of damages against the railway company, concluding for L.6000 of damages. During the dependence of the action, the defenders tendered the sum of L.1651, with expenses, which was refused. Thereafter, on 24th July last, they increased the amount of the tender to L.2000, with expenses, giving the pursuer twenty-four hours to consider whether he would accept it. The pursuer refused this tender also, and the jury trial took place on the 29th July, when the jury awarded L.2000 of damages to the pursuer, who died the following day in consequence of the injuries received at the accident. The pursuer now moves to have the verdict of the jury applied, and the defenders ask decree against the pursuer's representatives for the expenses incurred by them after the date of the tender of L.2000, which was all that the jury found the pursuer entitled to.

The Lord President and Lord Curriehill were of opinion that the defenders were entitled to recover the expenses incurred by them after the evening of the 25th July, the amount in the tender being equal to that awarded by the jury, and that being the time at which the period given by the defenders to the pursuer to consider whether he would accept the tender expired.

Lord Deas differed, holding that the pursuer was entitled to recover the whole of his expenses, as if no tender had been made, on the ground that the pursuer, at the time when the second tender was made (six days before his death), was not in a condition to consider the propriety of accepting or refusing the sum tendered, and was therefore not to be put at a disadvantage by his non-acceptance.

GRAHAM v. THE LIQUIDATORS OF THE WESTERN BANK.—Dec. 2.

Fraud—Purchase of Shares.

The pursuer in this case sues—(1) for reduction of three transfers of Western Bank shares purchased by him in 1850 from a person representing the bank; (2) whether the reductive conclusions be granted or not, he sues for payment of L.4304, being the price paid by him for these shares, for payment of two sums of L.750 each of calls on the said shares paid by him to the liquidators, and of L.7000 or such other sum as may be necessary to relieve him from all future calls. The pursuer also sues alternatively for damages, in the event of the other conclusions not being given effect to. The alleged ground of action is, that the pursuer was induced to purchase the shares by fraudulent representations made to him by a person acting for the bank. The Lord Ordinary reported the case

to the Court on the question whether a relevant case was stated on the record by the pursuer to entitle him to an issue.

The Lord President, in delivering judgment, said—The pursuer alleges that he was induced to purchase certain shares of the Western Bank by fraudulent representations made to him by a person acting for the bank, and that the shares were purchased from the bank, and he alleges that he was thus deceived into a position which he did not wish to occupy, and into a contract he did not wish to enter into. He seeks reduction and restitution, substantially, *restitutio in integrum*. It is said by the defenders that such a demand is inapplicable to the circumstances of the case, as the shares don't exist. I don't think that is conclusive. It was answered for the pursuer that the transaction was from the beginning null; that he never was a partner of the concern in respect of the fraud. I am not prepared to hold that the contract was null *ipso jure* without being set aside. I am not prepared to hold that the pursuer might not have taken benefit under this contract if it had been a favourable one, and therefore I am of opinion that it was not null from the beginning. There was not only a transaction of purchase and sale, however, but also an element of copartnership; and if the contract was not null until set aside, then there was partnership till it was set aside. It is impossible to hold that the pursuer is precluded from this investigation. He makes his demand in the form necessary for procuring redress, and that being so, as we cannot assume the facts necessary for discussing the law, I think he is entitled to an issue; but it must be an issue of fraud, and the defenders are entitled to a counter issue to set up their answer to the pursuer's demand. That counter issue, I would suggest, might be in such terms as these—'Whether the pursuer has barred himself from repudiating the purchase.' I foresee that many critical questions may arise at the trial, but that is no reason for refusing inquiry.

The pursuer was accordingly appointed to lodge a form of the issue under which he proposed to go to trial, and the defenders their counter issue.

COOPER AND WOOD v. NORTH BRITISH RAILWAY COMPANY.—Dec. 3.

Nuisance—New Trial.

The pursuers in this case sued the defenders for damages, on the ground that the defenders' works, near Portobello, for converting or hardening iron rails, had, by throwing off smoke, dust, and gaseous discharges, injured the pursuers' house and grounds at Baileyfield, near Portobello, and impaired the comforts of their occupation. Damages were laid at L.1000. At the trial before Lord Barcaple, in June last, the jury by a majority of nine to three found for the pursuers, and assessed the damage at L.200. The defenders having taken exception to the ruling of the judge at the trial on certain points, they presented a bill of exceptions, which the Court disallowed. A rule, however, was granted to the pursuers to show cause why the verdict should not be set aside as contrary to evidence. Counsel were heard some time ago, and to-day the Court refused the motion for a new trial.

In delivering judgment, the Lord President observed that there were two points which the jury had to consider—(1.) Whether there was any injury to the pursuers' house and grounds? and, (2.) Did the defenders'

works cause that injury ? In regard to the first, the evidence clearly preponderated in favour of the view that there was an injury from some cause ; and in regard to the second, there was evidence that there had been no injury prior to the erection of the defenders' works, and it was a natural inference that it was caused by these works. No doubt there might have been another cause ; but if so, there was not evidence of such. It might be quite true that there were more coals consumed at the pursuers' own works in the vicinity than at those of the defenders', but it did not follow from that that the injury to the house and shrubbery at Baileyfield was caused by the pursuers' own works. On the contrary, looking to the whole evidence, and particularly to the fact that from the relative positions of the pursuers' house and the defenders' works the smoke from the latter would, by the ordinarily prevailing wind during the season when vegetation is most delicate, be carried towards the former, his Lordship thought that the injury had been proved to be due to the defenders' works.

BAIRD, ETC., v. MAGISTRATES OF DUNDEE.—Dec. 4.

Charitable Trust.

To-day a series of joint-minutes was lodged by the parties for the settlement of this branch of the great hospital litigation of Dundee. The first minute prayed the Court to conjoin the declarator and supplementary declarator at the instance of the pursuers, praying the Court, under the remit from the House of Lords, to fix the amount of Johnston's bequest. The second was to the following effect :—1st, That the capital of the bequest by the late Robert Johnston should consist of L.1000 sterling, in addition to Monorgan's Croft ; 2d, That L.100 should be paid to the five pursuers in full of arrears of pension payable to them up to Martinmas 1863 ; and 3d, That the pension should be paid to each of the pursuers at the rate of L.1 sterling per month during their respective lives. Third, carrying out the above arrangement, it asked the Court to find and declare that Monorgan's Croft, as described in the summons and declarator and interdict, signeted 17th May 1860, and the buildings thereon, and revenues henceforth arising therefrom, and the sum of L.1000 sterling, are held by the Provost, Bailies, and Town Council of Dundee, as trustees of Johnston's bequest, and are subject to, and to be applied for, the yearly maintenance of the aged and impotent people of the town of Dundee in time to come ; to decern and ordain the Provost, Bailies, and Town Council, as trustees aforesaid, to make payment to the pursuers out of the funds of said bequest of the sum of L.100 sterling in full of the pursuers' claims for arrears of pension up to said date from the bequest, and to pay to each of the said pursuers of the action the sum of L.1 sterling per month during his or her life in time coming ; to the extent of these findings and decerniture, to repel the defences, and to find the pursuers and defenders entitled to expenses out of the funds of the said bequest ; and to find the Provost, Bailies, and Town Council of Dundee, as trustees aforesaid, liable therein ; and to ordain an account of the pursuers' expenses to be lodged, and to remit the same when lodged to the auditor for taxation ; and, *quoad ultra*, to assoilzie the defenders from the conclusions of the said action.

The Court approved of the minutes, interponed their authority thereto, and decerned accordingly.

This settlement secures to the aged and impotent people of Dundee a fund amounting at present to upwards of L.800 a year, and which, from the improvable nature of the property and its eligibility for feuing, may in a few years amount to L.1000 or L.1200.

Pet., F. R. SIM (SIME'S FACTOR).—Dec. 5.

Petition—Caution.

This petition was presented by a judicial factor appointed under the Pupils' Protection Act, for the purpose of having his bond of caution cancelled, and a new bond by the National Guarantee and Suretyship Association taken in its stead. The case was reported by Lord Barcaple, on account of the importance of the question whether bonds by a company of limited liability could be accepted by the Court.

It appeared from the report of the Accountant of Court, which was referred to, that he was satisfied of the respectability and responsibility of the company, and both he and the Lord Ordinary concurred in thinking that their bond may be safely taken. In the present instance, he observes, there seems to be only one element of difficulty. This is a company of *limited* liability. This is not thought by the accountant to present any practical difficulty, and in that view the Lord Ordinary concurs. In the case of a private cautioner, the accountant can only satisfy himself from the ostensible character or supposed circumstances of the person at the time, and these must frequently prove deceptive. Even where the sufficiency of the party is at first undoubted, unfortunate circumstances too often occur to alter his position. Again, where the circumstances of the party are positively known to be sufficient for the obligation undertaken, and likely to continue so, it remains unknown how many other cautionary obligations he may have undertaken. None of these objections apply to a public company; and accordingly, so far as the question is one of general expediency, there seems no doubt of the desirableness of substituting bonds by a public company for those by private persons. The responsibility and sufficiency of a company may be judged of and ascertained in the same way as that of a private person. In the present case the factory funds are not large, and there seems no doubt that the association is amply sufficient for the amount.

The Lord President said he had great difficulty about the case. It was a novel one, and the whole system of companies with limited liability was as yet untried. There was here a cautioner already, and he thought that at present the safe course was to refuse the application, especially as they had a personal cautioner.

The application was accordingly refused.

PATERSON'S TRUSTEES v. DAVID HUNTER AND OTHERS.—Dec. 10.

Superior and Vassal—Obligations.

This was an action at the instance of the trustees of the late William Paterson, gardener in Dundee, against Mr Hunter of Blackness, and his commissioners; and the question was as to the liability of the defenders as superiors of certain subjects in the suburbs of Dundee, to relieve the pursuers, as their vassals, of the poor-rates effeiring to these subjects. By feu-contract, dated 26th Nov. 1796, entered into between the late David Hunter, Esq. of Blackness (the defender's grandfather), and the pursuer's

author, the said William Paterson, the said David Hunter, in consideration of the feu-duty and of the casualties and prestations therein mentioned, sold, alienated, and in feu farm perpetually disposed from him, his heirs, and all others his assignees, to and in favour of the said William Paterson, his heirs or assignees whomsoever, heritably and irredeemably, all and whole, two acres of land, part of the estate and barony of Blackness, and situated in the neighbourhood of Dundee, as particularly described in the said feu-contract. The said two acres of land were so feued for the purpose of being occupied as a market garden, and the annual feu-duty stipulated was L.20. The entry was taxed, and in consideration of the feu-duty and other prestations, the superior bound and obliged himself and his heirs and successors to free and relieve the vassal and his heirs and successors 'of all cess, ministers' stipends, augmentations thereof, and whole other public burdens whatsoever payable furth of or for the said two acres of land, and teinds thereof, in all time bygone and in all time coming.' Shortly after the date of the feu, a cottage and outhouses were erected by the feuar upon the ground, the annual value of which cottage and outhouses was, as admitted by both parties, about L.19. In 1859, a sub-feu was granted by the pursuer to Mr John Thomson, manufacturer in Dundee, and since then buildings have been erected upon the ground in question of an annual value of upwards of L.350. The pursuers in this action as originally laid, claimed relief from the defenders of certain poor-rates paid by them prior to their said sub-feu to Thomson, and they also concluded for declarator that the defenders 'are bound to free and relieve the pursuers of all poor-rates furth of or from the said subjects in all time coming, including therein all and any poor-rates assessed, or which should be assessed, upon any and all buildings erected or to be erected upon the ground of the said subjects, or at least upon any and all buildings in the profitable and legitimate use of the said subjects erected or to be erected thereupon.' This last conclusion was not, however, ultimately insisted in, and the action, as it came before the Court for judgment, was confined to a claim for relief of the poor-rates actually paid by the pursuers in respect of the ground feued and of the cottage and outhouses originally erected thereon as above mentioned. It was admitted for the defenders that they were liable in the relief sought, so far as the poor-rates in question effeired to the annual feu-duty of L.20; but they maintained that they were not liable beyond that limit, or for the proportion of poor-rates effeiring to the increased value of the land as an agricultural subject, or effeiring to any buildings which had been erected upon it. The Lord Ordinary found for the pursuers, and the defenders having reclaimed, the case was debated last month, and was to-day advised.

The Lord President and Lord Curriehill concurred in holding that the obligation of relief contained in the feu-contract could not be limited to the proportion of burdens effeiring to the annual feu-duty stipulated, and that the criterion of liability must be the present value of the land feued, including therein the value of such buildings erected upon the land as must be presumed to have been fairly within the contemplation of the parties when the feu was granted. They were further of opinion, that in the present case the cottage and outhouses at least were buildings of the latter sort, and they accordingly were for affirming the Lord Ordinary's interlocutor. At the same time, however, they reserved their opinion as to

whether a superior could be called upon to pay in respect of an obligation of relief of this kind a larger sum than he actually received for feu-duty, and they also reserved their opinion as to the extent of the superior's liability in the case of a feu on which buildings had been erected of such a character as to make the land be subsidiary to the buildings.

Lord Deas dissented. He thought the criterion of the superior's liability under the obligation of relief was the amount of his estate in the feu. That estate was here represented by the annual feu-duty; and he was therefore for sustaining the defenders' plea that that feu-duty was the measure of liability.

MURPHY v. KENNEDY.—Dec. 10.

Process—Execution.

In this advocacy of Jessie Kennedy against Henry Murphy, pawnbroker, Glasgow, she states an objection to an execution of citation, founded on the 16 & 17 Vict., c. 8, sec. 9, the objection being that the execution was not engrossed at the end of and continuous with the petition. The petition was written on four pages, and on the fifth there was a minute of the petitioner and an interlocutor of the Sheriff-substitute. The execution was written at the foot of the fifth and the top of the sixth pages. The Court, affirming Lord Barcaple's interlocutor, repelled the objection, holding that the interlocutor of Court sustained the continuity, and Lord Curriehill specially reserving his opinion as to whether an execution written entirely on the fifth page, when the petition ended at the foot of the fourth, would be a nullity.

CAMPBELL v. M'HOLM.—Dec. 11.

Arbitration—Reduction of Decree.

The pursuer, Alexander Campbell, Esq. of Auchindarroch, in the county of Argyle, seeks to reduce a decret-arbitral in favour of William M'Holm, late tenant in Badden, on the pursuer's estate. The decret found that the defender had expended L.163 on improvements by draining, etc., on his farm before leaving it. By agreement, if the defender had expended over L.100, he was to receive L.150; if under L.100, he was to receive L.105, for renouncing his lease. The difference between the parties was thus only L.25. The ground of reduction was, the arbiters, who were farmers in the neighbourhood, had been guilty of 'corruption,' in asking questions at the defender as to the drains put in by him, and that he had represented that he put in more drains than he had actually done, the whole drains being valued at L.64.

The Court, by a majority, adhered to Lord Ormidale's interlocutor, assolizieing the defender, and found his late landlord liable in expenses.

BURN CALLANDER v. BURN AND OTHERS.—Dec. 17.

Writ—Designation—Adoption.

On 21st December 1841, the late Mr Burn Callander executed a bond of provision in favour of his younger children over his entailed estates. The writer of this deed, though named in the testing clause, was not *designated*. The questions, therefore, raised in the present case between the late Mr Burn Callander's heir, succeeding to the entailed estate, and the younger children, are—(1) whether the bond of provision is improbable;

and (2) whether, assuming it to be improbable, it has been rendered effectual by the operation of all or any of Mr Burn Callander's subsequent testamentary writings. The deeds executed by Mr Burn Callander, subsequent in date to the bond of provision, and on which the defenders founded as referring to, adopting, and recognising the existence and validity of the bond of provision, were—(1) Two codicils to the deed itself, of date 6th and 22d October 1853, naming additional trustees, and each of the two parties therein named, 'as one of the tutors and curators to my children, with the same powers as the trustees and tutors and curators before named.' These codicils are strictly probative, and are written on the margin of the deed. (2) A deed of October 1853, entitled 'second codicil to post-nuptial contract.' By the contract an annuity of L.2300 had been secured to Mrs Callander, which, by a codicil in May 1851, was restricted to L.2000; and now, by this second codicil, subscribed by Mr and Mrs Callander, the annuity is further reduced to L.1500. It is a regularly tested deed, and proceeds on the narrative that Mr Callander had 'settled, by a bond of provision dated 21st December 1841, the sum of L.26,000, or four years' free rents of my entailed estates, upon our three younger children, in terms of the powers conferred on me by the deed of entail under which I hold the said estates.' An abstract is referred to for the net rental, after deducting, *inter alia*, 'interest of L.26,000, settled by Mr Callander on his three younger children, L.1300'—one-third of which rental it was in the power of Mr Callander to settle on his widow, brought out to be L.1500. On this footing, and upon this express declaration, the annuity thus restricted has become payable to Mrs Callander. (3) A codicil, of date 22d October 1853, to his testament, executed by Mr Callander in consequence of the necessary restriction of his wife's annuity by the preceding deed. It proceeds on the footing of the bond of provision of 21st December 1841, and codicils of 6th and 22d October 1853, being effectual; and it farther declares that the tutors and curators therein named, 'to all my children, including my eldest son,' should have the charge of his moveable estate as executors, so as to prevent confusion in the management of his estates and effects. Upon the death of Mr Callander, the several deeds mentioned and referred to were found in his repositories. The Lord Ordinary (Jerviswoode) held that the bond of provision was improbable from the want of the designation of the writer; and that, the writ being thus *per se* subject to statutory nullity, it had not been so acknowledged or recognised by Mr Callander in his subsequent probative writings as to overcome this defect. The defenders having reclaimed, the case, in consequence of the importance and difficulty of the questions raised, was sent to the whole Court, and was to-day advised along with the opinions of the consulted judges.

The judges unanimously held that the bond of provision was improbable, from the want of the designation of the writer in the testing clause; but a majority of the judges held that the deed, and the obligations it contained, had been recognised and adopted as his by the grantor in the subsequent writings and deeds (above mentioned), to which no objection existed, and so were made effectual. The minority of the judges, consisting of Lords Mackenzie, Kinloch, Jerviswoode, and Barcaple, held that the nullity caused by the non-designation of the writer was not re-

moved by the subsequent deeds, there being nothing, in their Lordships' opinion, in these deeds equivalent to an acknowledgment or recognition by Mr Callander of the bond of provision as a bond executed by him, and which he intended should receive effect, or any such reference in the subsequent probative writings to the prior improbable bond, as effectually to constitute the provision in favour of the younger children.

SECOND DIVISION.

Decl. and M.P., KELLAND AND OTHERS (SCOTT'S TRUSTEES) v. SIR G. H. SCOTT DOUGLAS AND OTHERS.—Nov. 27.

Trust—Power of Assumption.

By his trust-settlement, *mortis causa*, dated 28th April 1820, the late Colonel Francis James Scott conveyed his whole estate, heritable and moveable, to Mr John Tod and others, as trustees, for certain specified purposes. One of these was to set apart a sum of L.4000, to be employed in the permanent maintenance of a school for boys and girls, in connection with the Episcopal Church in Edinburgh. After leaving certain legacies, and providing a liferent of the residue to his two sisters, he declared, 'The fee of said residue, after the death of my said sisters, shall be lent out by my said trustees in the same manner above directed, and the interest arising therefrom shall be expended in maintaining an additional number of children to the school now under Mr Craig's direction.' A power was granted to the trustees to name and assume other trustees, 'to act with or after them in the premises.' By a codicil, dated 12th January 1821, Colonel Scott, on the narrative that he did by this settlement 'devise to certain trustees therein named the sum of L.4000 sterling, for the maintenance of a free school, according to certain restrictions therein specified,' declared, 'I hereby revoke such bequest and appointment altogether.' He then proceeds to 'give and bequeath' to certain gentlemen, specifically mentioned, the sum of L.2000 at his death, and L.2000 additional on the death of his sisters, in trust, to maintain a school 'in inseparable connection with the Episcopal Chapel commonly called, or to be called, St James' Chapel, Broughton Place, Edinburgh.' He appointed the school to be under such regulations 'as to the said trustees, or a majority of them, shall seem best;' and he further declared, 'I hereby revoke all other bequests or devises which may in any way contradict this arrangement.' The trustees named by this codicil comprised the whole testamentary trustees except one, and four additional trustees, not named in the settlement. No power of assumption was given to these codicillary trustees. By an addition to this codicil, not dated, Colonel Scott declared: 'In the event hereafter of the interest of my property exceeding the expenses of such donations heretofore mentioned, I bequeath the overplus to be laid out in such charitable institutions or gifts as the trustees or their successors named in this codicil may judge most proper, for supporting the needy, or educating any additional number of boys and girls, or otherwise as the trustees may judge best. I also bequeath to the newly formed school L.100 per annum additional to the present allowance, at the demise of both my sisters, Elizabeth Scott and Agnes Scott.' Colonel Scott died on the 18th December 1821. On 11th October 1851, Mr Tod, on the supposition that he was now the sole survivor of the original accepting trustees, both under the settlement and codicil, executed a deed of assump-

tion in favour of Mr John Robert Tod and the Rev. John Willison Ferguson, as trustees alongst with him, 'for executing the purposes of the said trust-deed and codicils.' These assumed trustees having died, Mr Tod, on 17th September 1856, executed another deed of assumption in similar terms, in favour of the present pursuers, and of Mr Robert Smyth Anderson, the latter of whom declined to accept. Mr Tod died soon afterwards; and difficulties having been found by the assumed trustees on several points, they raised the present action of declarator for the purpose of clearing their powers, which came to depend before the present Lord Ordinary. On 19th March 1859, the Lord Ordinary (Kinloch) pronounced an interlocutor, finding the pursuers well assumed as trustees under the original settlement, and entitled to employ L.4000 of the testator's funds, and such further sum as would yield L.100 per annum in providing for the establishment and maintenance of the school pointed out by the testator, according to such scheme as the Court might approve; but the Lord Ordinary found, at the same time, that they did not come in room of the codicillary trustees, who formed a separate legatory trust, and to whom no power of assumption was given; and that they, therefore, had no right to exercise the power of nominating the charitable institutions which should take the residue in terms of the last codicil. As without such nomination it was impossible to discriminate the charities which should share the benefit, the Lord Ordinary considered this bequest void for uncertainty, and held the residue to pass to the testator's legal representatives. This interlocutor was reclaimed against by both parties to their Lordships of the Second Division. In the meanwhile, it was discovered that Mr Tod had been under a misapprehension in considering himself to be the only surviving trustee; and a minute was given in to the Second Division, setting forth that, at its date (17th April 1862), there still survived, of the original testamentary trustees, Messrs James Pillans and James Evans, and of the codicillary trustees four, viz., Messrs Pillans and Evans, Sir Duncan M'Gregor and Mr George Ross. Of these, Sir Duncan M'Gregor and Mr Evans resided out of the country. Another, Mr Douglas of Cavers, who was both an original and a codicillary trustee, though dead by the time the minute was given in, had only died in the month of August previous, 1861. It further appeared that, in May 1860, Messrs Pillans and Ross executed a new deed of assumption in favour of the pursuers, ratifying, at the same time, the deed of Mr Tod, and all the actings and proceedings which had taken place in the interval. In December of the same year, 1860, Mr George Ross and the pursuers executed a deed of appointment, specifying the charitable institutions which were to take the residue of Colonel Scott's estate. Of the granters of that deed, Mr Ross alone was a codicillary trustee; and at this time there were in life codicillary trustees to the number of five—viz., Mr Ross himself, Sir Duncan M'Gregor, Mr Evans, Mr Pillans, and Mr Douglas of Cavers. The deed of December 1860 ran in name of all these, except Mr Douglas of Cavers; but Sir Duncan M'Gregor and Mr Evans declined to sign it on the ground, it is said, of their long absence from Scotland, and of their having ceased to act as trustees since they went abroad. Mr Pillans declined to sign on the ground, it is said, of his advanced age, and of his having for many years taken no part in the management of the trust affairs. No explanation is given why Mr Douglas of Cavers, who had formally accepted the

trusteeship, and was then alive and resident in Scotland, did not join in the deed, except that he had, a long time before, written a letter stating that his residence in the country made it inconvenient for him to act in the trust. The present process of multiplepoinding has been raised for the purpose of having the questions arising out of the new situation of matters decided by the Court. The Lord Ordinary reported the case to their Lordships of the Second Division; and to-day the case was advised.

The Lord Justice-Clerk said he was satisfied that the deeds of assumption were ineffectual, because in the one case the deed had been executed by two of four surviving trustees, and in the other by one of two surviving trustees, without communication or consultation with the remanent trustees. It was true these remanent trustees were temporarily absent from the country; but such temporary absence was no ground of disqualification, and the deeds of assumption having been executed by less than a quorum of the surviving trustees, must be set aside as *ultra vires*. Holding that opinion, he was satisfied that the pursuers of the declarator being the trustees so assumed had no title to sue, and that action, therefore, must be dismissed. It did not follow, however, that their title was not good enough in the multiplepoinding. They were the holders of the fund, and as such were entitled to raise an action for its distribution. Difficulties had arisen as to carrying it into effect, because the two now surviving trustees, Sir Duncan M'Gregor and Mr Evans, had stood aloof, and declined to exercise any discretion reposed in them in the distribution of the residue. He would therefore propose that the judgment of the Court should be intimated to them, in order that they might consider what their duty was in the present position of the trust.

Lord Cowan concurred in the practical result at which the Lord Justice-Clerk had arrived, though he differed as to the nature of the power of assumption under the codicil.

The Court therefore dismissed the action of declarator without expenses, and in the multiplepoinding pronounced judgment in accordance with the opinion of the Lord Justice-Clerk, ordering the judgment to be intimated to Sir D. M'Gregor and Mr Evans, reserving all questions of expenses.

DAWSON v. STIRTON.—Dec. 4.

Repetition—Liability of Trustee.

This was a reduction of a judgment pronounced by the Sheriff of Perthshire, in an action at the instance of the pursuer against the defender. The circumstances, as averred by the pursuer, were these:—James Stirton was tenant of the farm of Little Fardle, in Perthshire. In 1853 he became insolvent, and executed a trust-deed for behoof of his creditors in favour of Alex. Duncan, a bank agent at Blairgowrie, and his brother, the defender, Andrew Stirton. These trustees, after accepting office, resolved to renounce the lease and give over the waygoing crop to the landlord at a valuation to be fixed by arbiters. Immediately thereafter the landlord leased the farm to the pursuer, Robert Dawson, who, on the other hand, agreed to take over the crop at the valuation price. The arbiters appointed having entered on the submission, an application was made to them in the course of it by Duncan, one of Stirton's trustees, for a payment to account; and the arbiters recommended Dawson, by whom the price was ultimately to be paid, to pay Stirton's trustees L.100 to account.

Dawson alleged that he paid this sum on 21st March 1856, and this allegation he supported by an entry to that effect in the cash-book of the trust-estate in the handwriting of Duncan, the trustee and cashier of the trust. The submission having gone on to a termination, it was ascertained that the value of the crop was L.618, and that the amount payable to Stirton's trustees, after deducting the rent due to the landlord, was L.211, 10s. 3d. This sum the defender received from the agent for the landlord on 20th June 1856, who omitted to deduct, as he should have done, the L.100 which had been paid to account. On the same day the pursuer made a settlement with Mr Condie, the landlord's agent, who had at the time a sum of L.1000 belonging to the pursuer in his hands. In this settlement the pursuer was debited with the full value of the crop. The result was, that the pursuer paid the L.718 instead of L.618 as the price of the crop. Duncan having died insolvent, the pursuer raised an action against the defender for repetition of the L.100 which had been overpaid by mistake. The Sheriff-substitute (Barclay) and Sheriff (Gordon) assoilzied the defender. An action of reduction of these judgments having been brought, the Lord Ordinary (Barcapple) reduced them, and decerned against the defender for repayment of the L.100. The defender having reclaimed, the Court to-day, after full argument, recalled the Lord Ordinary's interlocutor, and again assoilzied the defender.

BUIE v. STIVEN.—Dec. 5.

Poor Law—Aliment.

This is an advocacy from the Sheriff Court of Elgin. In the end of January 1860, Widow Catherine Millar, upwards of eighty years of age, resident in Elgin, and without any means of subsistence, applied to the Parochial Board for relief. The Board admitted her claim; but having ascertained that she had a grandson, George Buie, a plumber by trade, and the keeper of an inn called the Star Inn in Elgin, who was able to support his grandmother, the Board called on him to do so, and intimated that they would hold him liable for all advances made by them. To this demand Buie made answer, that he would receive his grandmother into his own house and aliment her there; that he was ready to pay the past advances of the Board, but that he would pay nothing in future. The Board intimated this offer to Widow Millar, but she refused to go to Buie's, saying she would rather starve than go. The Board therefore continued their advances to Millar, and raised an action against Buie for repayment. His defence was, that having offered aliment to his grandmother in his own house, he had done all he was bound to do. The Sheriff-substitute sustained this defence, on the ground that the Parochial Board was only bound to afford 'needful sustentation' to paupers, that the offer by Buie to take his grandmother into his own house was 'sustentation,' and therefore there was no obligation on the Board to make the advances for which they sued. The Sheriff, on appeal, recalled this interlocutor, on the ground that a mother was entitled to *separate* aliment from the son, except where the son was unable to give it—that Buie's means were proved to be such as to enable him to give a *separate* aliment—that Widow Millar was therefore entitled to refuse to go to her grandson's house, and the Board could not force her—and that therefore, in point of fact, she remained destitute notwith-

standing the offer, and the Board were entitled to recover the aliment they had given.

Buie having presented a note of advocacy, the Court to-day, after hearing counsel, recalled the Sheriff's interlocutor, and returned to that of the Sheriff-substitute, which assolizied the defender.

The Lord Justice-Clerk observed, that the duty of the Parochial Board was merely to aliment the poor, so as to obviate starvation. They could never have a right to be reimbursed of more than 'needful sustentation;' and if relatives offered needful sustentation to a poor person, then the parish was relieved from all obligation *quoad* that person. It might be that in a question with the grandmother herself, the defender might have been bound to give her a separate aliment; but that would have been a totally different case. That would have been an action *ex pietate*, and founded on equity; but an inspector of poor had nothing to do with questions of equity. He was an officer acting under a statute, and his duty under the statute was only to prevent starvation. After the offer of the defender there was no risk of starvation, and the advances made by the Board were therefore not of the character of 'needful sustentation,' and could not be recovered. The offer relieved the parish of all responsibility, and brought the title of the inspector to interfere to an end.

MILLER v. MILLER AND SIMPSON.—Dec. 9.

Process—Reclaiming Note.

In this action of divorce, at the instance of James Miller, writer, Dundee, counsel for the co-defender objected to the competency of the reclaiming note, in respect that it did not have a copy of the summons appended, in terms of the 77th section of the Act of Sederunt of 11th July 1828.

After some discussion, in the course of which the Lord Justice-Clerk suggested that the Court of Session Act, 1850, might have operated as a repeal or partial repeal of the section of the Act of Sederunt relied on, as that section required the original defences to be printed as well as the summons, which he did not remember of having ever seen done—the case was continued, to allow the parties on both sides to look into the Acts and authorities.

At the calling, it was argued for the pursuer that consistorial causes were privileged causes, and were different from, and not subject to, the same rules as other civil causes; further, that the Court of Session Act, 1850, had repealed the Act of Sederunt, so that neither the original condescendence nor the original defences required to be printed if the record was made up on the revised papers, and the summons was in no different position from the original condescendence and defences. The summons had here been omitted as an oversight, and it would do no harm to allow the reclainer to print it at this stage.

It was maintained by the defender that the rule of the Act of Sederunt to append the summons was absolute, and had been so acted upon in six decisions, three following the Act itself at the rate of one each year, and the last being in 1845. That absolute rule had not been abrogated in words by the Act of 1850, nor by implication; and it had not been infringed upon at all except by two decisions—the one in 1852 dispens-

ing with the original defences when these were revised defences, and the other in 1853 dispensing with the original condescendence.

Lord Cowan was of opinion that the Act of 1850 did not imply a repeal of the 77th section of the Act of Sederunt; one of the sections of the Act of 1850 rather raised the contrary presumption. There was no enactment repealing that wholesome provision, and there was no reason why it should be repealed, for in every case it was necessary for the Court to have the summons before them. He could see no distinction between consistorial causes and other civil causes. The Act merging the Consistorial Court in the Court of Session expressly provided for the review of the judgments of the Lord Ordinary in such causes 'in the same way as in all civil causes.' His opinion therefore, arrived at not without regret, was that this reclaiming note was incompetent.

The other judges concurred.

The Court therefore refused the reclaiming note, and found the respondent entitled to expenses.

OSWALD'S TRUSTEES v. OSWALD.—Dec. 11.

Entail—Prohibitory Clause.

This was an action of declarator and reduction, at the instance of the trustees and beneficiaries under the trust-disposition executed by the late Richard Alexander Oswald, of Auchencruive, dated 19th October 1838, against Alexander Oswald, now of Auchencruive, and the three nearest heirs substituted after him, by a deed of entail, dated 22d January 1790. By his trust-disposition, R. A. Oswald conveyed all his lands and estates to his trustees for certain purposes. The lands to which the present action relates were, however, understood to be carried by the entail of 1790, and the heir of entail was allowed to take and maintain possession of them. It now, however, appears that the word 'irredeemably' in the prohibition against alienation is written on an erasure, and the present action has been raised to have it declared that the entail of 1790 is defective, and that the lands contained in it were carried by the trust-deed of 1830. The defenders support the entail of 1790 by an earlier entail of 1780, and farther maintain that the entail is at all events effectual against gratuitous alienations such as the trust-deed of 1838; while they also say that, even supposing R. A. Oswald had power to convey the lands in question, his trust-deed of 1838 did not include or convey, and was not intended to include or convey, to the pursuers the lands and estates described in the summons. The Lord Ordinary (Jerviswoode) assoilized the defenders on the ground that the entail of 1790 contains an effectual prohibition against altering the order of succession, and that the deed of 1838 is to be regarded simply as a deed altering the order of succession, and therefore cut down by the clause in the entail. The defenders reclaimed, but the Court unanimously adhered to the Lord Ordinary's interlocutor with expenses.

App., COOKSON AND STEEL AND OTHERS, IN BOYD'S SEQUESTRATION.—

Dec. 11.

Bankruptcy—Personal Protection.

This was an appeal from a resolution passed at a meeting of the creditors of James Boyd, soap and candle manufacturer, Glasgow, renewing

the personal protection which had been previously granted to the bankrupt, for the period of two years from 7th September 1863. The appeal was presented at the instance of three of the principal creditors, being a majority in value of the whole, and was maintained on the following grounds:—(1) That the appellants had not received notice of the meeting at which the resolution was passed, and were not aware of the fact of the meeting having been called; (2) That the meeting was only attended by three creditors, friends of the bankrupt, whose votes were liable to objection on different grounds; (3) That the conduct of the bankrupt was such as would justify the creditors in refusing to renew the protection for so long a period. It appeared from the bankrupt's examination, that the greater part of his liabilities consisted of the price of lard and other articles adapted for use in his trade, which he had bought in large quantities from the wholesale dealers shortly before his insolvency, and immediately pledged with commission-houses in Glasgow for sums considerably below the cost price, the goods being afterwards sold by the brokers. Of the three creditors attending the meeting, one, the bankrupt's father, claimed to vote upon a promissory note for L.500, granted within sixty days of bankruptcy, and a claim for rent of premises, which were both objected to as insufficiently vouched. Another creditor, who claimed for a balance of L.60 on an account-current, was objected to on the ground that the account contained unvouched entries sufficient, if deducted, to extinguish the balance. The third creditor, who claimed on an account for groceries to the amount of L.9, 17s. 5d., was objected to because the Bankruptcy Act, section 79, requires the concurrence of a majority of the creditors 'in number and value' to all resolutions for renewal of protection; while, by section 101, it is provided that creditors claiming to an amount below L.20 shall not be 'reckoned in number.'

The case was this day advised, when the judgment of the Court was delivered by the Lord Justice-Clerk. Their Lordships were of opinion, looking to the allegations of the appellants, that there was no difference in the grounds of the appeals under the 169th and 170th sections, and it was therefore immaterial whether the merits of the application were considered with reference to the one appeal or the other. There might be cases where an appeal under the 169th section was the only remedy; *e.g.*, if votes had been obtained by corruption or bribery. In the present case the question really resolved into a scrutiny. The resolution was carried unanimously, and a scrutiny was of no avail, unless it could be shown that every one of the votes was objectionable. Without entering into the particular objections, the Court intimated their opinion that the creditors had failed in proving that no one of the creditors present was entitled to vote. The appeals were therefore dismissed with expenses.

Pet., A. N. THOMSON.—Dec. 17.

Bankruptcy—Election of Trustee.

In September 1857, the Montrose Foundry Company were sequestrated under the Bankruptcy (Scotland) Act, 1856, and the petitioner, A. N. Thomson, who was a creditor of the firm, was appointed trustee on their estates. The trustee realized and divided the said estates in so

far as known at the time; and having complied with all the provisions of the statute, he was discharged by the Sheriff in Oct. 1861. Neither the firm nor the partners were discharged. It has now been ascertained that there are still funds belonging to the firm. In these circumstances, this petition has been presented for the purpose of having a new trustee appointed and invested with the sequestrated estate of the company and its partners, and also that new commissioners may be appointed, and the sederunt books, now in possession of the accountant in bankruptcy, be made available for the further procedure in the sequestration. When the case was in the Single Bills, the Court appointed the petition to be intimated in the minute book and on the walls for eight days, and to be served on the individual partners of the sequestrated Montrose Foundry Company. To-day the Court were of opinion that this was a *casus improvidus* under the 74th section of the Bankrupt Statute, but it was so clearly within the principle of that section that *ex nobili officio* they would grant the prayer of the petition.

Their Lordships, therefore, pronounced the following interlocutor:—
 Their Lordships having resumed consideration of the petition, remit to the Lord Ordinary on the Bills to appoint a meeting of the creditors of the said Montrose Foundry Company, and of James Chalmers, John Beattie, and Robert Duthie, the individual partners of the said company, to be held at such time and place as his Lordship may fix, to elect a trustee or trustees in succession, and commissioners on the said sequestrated estates, and to appoint said meeting to be advertised in the *Edinburgh Gazette*, and to remit to the Sheriff of the county of Forfar to proceed in said sequestration, in terms of the statute; and grant warrant on the accountant in bankruptcy, to deliver to the petitioner or to transmit to said meeting the sederunt books in the sequestration.'

OUTER HOUSE.

(Before Lord Barcaple.)

M.P., EARL OF WEMYSS v. CAMPBELL.—Dec. 11.

The Breadalbane Succession.

This is an action of multiplepoinding, brought in the name of the Earl of Wemyss against Mr Campbell of Boreland, claiming to be sixth Earl of Breadalbane, and against Mr Campbell of Glenfalloch, who makes the same claim. The lands of Auchmore and Kinell, in the county of Perth, are part of the Breadalbane entailed estates, and of these the pursuer had a lease for shootings for the year 1863. The rent was £900, and the present action is brought to have it found that the pursuer is liable only in once and single payment, and that the competing claimants ought to be ordained to state their respective claims on the fund *in medio*. The action is brought on the narrative that both claimants have presented petitions to the Sheriff of Chancery to be served as nearest heir of entail to the late Marquess of Breadalbane, which petitions were conjoined by the Sheriff of Chancery, and have been since advocated to the Court of Session. Objections to the action were lodged on behalf of the Earl of Breadalbane (Glenfalloch), who pleaded—(1) The incompetency of the

action, in respect of no double distress; (2) That the real raiser (Boreland) was no party to the contract between the objector and the Earl of Wemyss, and therefore had no right or title to claim payment thereof; (3) That the real raiser, having no right to sue the Earl of Wemyss, could not bring the present action of multiplepinding; (4) *Res judicata* (in respect of the recent refusal of the First Division to sequester the entailed estates of Breadalbane on the petition of the real raiser), that the objector is entitled to possession of the entailed estates of Breadalbane, and consequently that he is entitled to the rents payable by his tenants in the said estates, in respect of possession derived from him.

The Lord Ordinary has pronounced the following interlocutor:—

'*Edinburgh, 10th December 1863.*—The Lord Ordinary, having heard counsel for the parties on the objections to the multiplepinding, and having made avizandum and considered the process, sustains the objection that the action is incompetent in respect that there is no double distress; dismisses the action, and decerns; finds the real raiser liable to the objector in the expenses of process; allows an account thereof to be given in, and, when lodged, remits the same to the auditor to tax and report.

'E. F. MAITLAND.'

'NOTE.—The Lord Ordinary is not satisfied that this multiplepinding is formally, and, as matter of legal necessity, excluded by the judgment of the Court on the petition for sequestration and the appointment of a judicial factor. But he looks upon that judgment as having settled that the objector enjoys at present the position and rights of heir-apparent, and that the real raiser is not at present to be held as *in pari casu* in this matter with the objector, in respect of the depending competition between them, and the averments by which he supports his claim.

'This being so, it follows that the real raiser has not at present a title on which he could sue or in any way distress the nominal raiser for the rent with reference to which he has raised this multiplepinding; while it cannot be disputed that the objector has a title to receive and discharge that rent. Where the allegation of double distress is rested entirely upon the claim of the real raiser to the fund, and where, as in this case, it cannot be shown at the outset that he has clearly no title at present to pursue that claim, it appears to the Lord Ordinary that this want of title in the real raiser constitutes a good objection to the multiplepinding.

'It does not seem to be a valid answer to this objection, that possibly before the competition in the multiplepinding could be disposed of, there may be a change of circumstances which would give the real raiser a title. The competency of a multiplepinding must depend upon the state of matters when it is raised. It is not the object of the process to protect the possible rights of parties who have not at present a title to sue the common debtor.

'The Lord Ordinary does not proceed upon the ground which was urged for the objector, that the rent is due under a lease granted by him. In a more advanced state of the competition for the estate, this might not be *per se* a sufficient objection to the real raiser's title to prosecute a claim to the rents, whether accruing under leases granted by former proprietors or by his present competitor. The real raiser relied much upon the fact that the judgment on the petition for a factor has been taken to appeal; but, in the meantime, it is an authoritative judgment of the Court

as to the position of parties with reference to the rights of apparen-
 cy. At the utmost, the appeal should only lead to the sisting of the present
 process until a judgment is obtained in the House of Lords; but this
 would not be an appropriate course in the present case, in which the
 result of success in the appeal, and of the appointment of a judicial factor,
 would be to make this multipointing unnecessary and inept.

‘E. F. M.’

English Cases.

TRADE MARK.—A firm consisting of three partners for many years used the
 letters B B H (being the initials of the three partners' names) with a device as
 a brand for the goods manufactured by them, and on one partner dying, the use
 of the brand was continued by the survivors. In 1858, one of the two survivors
 died under circumstances which, in the opinion of the Court, entitled the execu-
 tor of the survivor to have the business sold as a going concern; and it was
 held, the right to use the brand did not form part of the saleable assets of the
 business. Distinction in this respect between a trade mark indicating the
 locality where goods are made, and a trade mark indicating the firm by which
 they are made. If the trade mark had been of the former kind, it would have
 been saleable. The M. R.—A surviving partner has a right to use the name,
 and *pari ratione* the personal trade mark, of the old firm.—(*Blanchard v. Hill*
 doubted. *Hall v. Barrows*, 32 L. J., Ch. 548.)

WILL.—A devise of residue of real estate upon contingent or future trusts,
 does not carry with it the intermediate income; but such income results to
 testator's heir-at law; and the 1 Vict., c. 26, has made no difference in the law
 in this respect. A similar rule applies to a contingent or future bequest of any
 particular portion of the personal estate, as chattels real. *Secus*, as to a bequest
 of residue of personal estate, which, though contingent or future, carries with
 it all the intermediate income (*Wood, V. C.*).—(*Hodgson v. Bective*, 32 L. J.,
 Ch. 489.)

JUDICIAL SEPARATION.—A wife in consequence of her husband's cruelty left
 his house. She afterwards came back, but refused to return to his bed except
 upon condition that he would restore her to her position in the household as his
 wife, with which he refused to comply. In consequence of his ill treatment,
 she again left and never returned. After the final separation, in consideration
 of the wife's agreement to apply part of her settled income for the benefit of the
 children of the marriage, the husband promised to allow them to visit her from
 time to time. This promise he failed to perform, and in consequence of the
 breach of his agreement, and not from fear of personal violence, the wife six
 years after the separation instituted a suit for judicial separation; and it was
 held by the full Court, affirming the decision of the Judge Ordinary, that the
 wife was entitled to a decree of judicial separation.—(*Cooke v. Cooke*, 32 L. J.,
 Pr. & M. 154.)

CHARTER-PARTY.—By charter-party, dated London, the 19th of October 1860,
 plaintiff's ship was chartered to defendant as follows: 'It is this day mutually
 agreed between A. B., owner of the good ship or vessel called the M., of 420 tons
 or thereabouts, now in the port of Amsterdam, and J. B., of London, merchant,
 that the said ship, being tight, staunch, strong, and every way fitted and ready
 for the voyage, shall with all possible despatch proceed direct to Newport, Mon-
 mouthshire, etc., and there take in cargo. On the 15th of October the ship was

at N., sixty-two miles from Amsterdam, and not in the port of Amsterdam, and under favourable circumstances would have reached the docks at Amsterdam in twelve hours more, but in consequence of contrary winds and the absence of steam-tug power, she remained at N. over the 19th of October, and did not reach the docks till the 23d of October. She discharged her cargo with all possible despatch, was immediately made ready for sea, and proceeded direct to Newport, where she arrived on the 1st of December. Defendant altogether refused to load the ship. In an action brought against him for such refusal, it was held, by the Court of Exchequer Chamber, reversing the judgment below, that the words, 'now in the port of Amsterdam,' in the charter-party, imported a warranty, and that as the ship was not in the port of Amsterdam at the time when the charter-party was made, defendant was justified in saying that there had been a failure of performance of a condition precedent, and in refusing altogether to carry out the contract.—(*Behn v. Burness*, 32 L. J., Q. B. 204.)

LIBEL.—A writer in a public periodical has no other right than that of any other person of freely discussing the public acts or writings of another, and he is not 'privileged' in the proper sense of the word. If, therefore, an article in a newspaper commenting on public acts or writings contain imputations of sordid motives or dishonest conduct, and the acts or writings themselves do not afford a reasonable ground for such imputations, the *bonâ fide* belief of the writer that the imputations are well founded affords no defence to an action. Cockburn, C. J.—Where the public conduct of a public man is made the subject of observation, and the writer who is commenting upon it makes imputations of motives which fairly, and properly, and legitimately arise out of the conduct itself, and the jury shall be of opinion, not only that the criticism was honest, but also well founded, there I should be prepared to say that the imputation so made would not be the subject of an action. But I do not think we should be laying down the law according to what has always been understood to be essential to the best interests of the community, if we were to say, because a writer may fancy that the conduct of a public man is open to the suspicion of dishonesty, that therefore he is entitled to denounce that man as dishonest.—(*Campbell v. Spottiswoode*, 32 L. J., Q. B. 186.)

MASTER AND SERVANT.—Where servants are engaged in one common object, the injury sustained by one servant in consequence of the negligence of another servant does not give a right of action against the master. The guard of a train and the platelayers, whose duty it is to attend to the rails over which the train passes, are engaged in one common object, the safe conduct and transit of the train; and therefore no action can be maintained against the company by the representative of a guard of a train killed by the train running off the line in consequence of the neglect of the 'ganger' of the platelayers to renew the decayed metals which fasten the chairs to the sleepers on the railways.—(*Waller v. The South-Eastern Rail. Co.*, 32 L. J., Ex. 205.)

VENDOR AND PURCHASER.—Plaintiff became the purchaser at a sale by auction of two lots of real property. One condition of sale was, that within ten days the vendor should deliver to the purchaser an abstract of title; and another condition was, that if any requisition should be made with which the vendor was unable or unwilling to comply, the latter should be at liberty to rescind the contract, and return the deposit without any interest, costs, or expenses. The property in question had formerly belonged to A., B., and C., who were partners in trade. C. died before the sale, and his executors had released to A. and B. all claim on the partnership property. An abstract of title was delivered within the ten days, showing title in A., B., and the executors of C., no notice being taken in it of the release by the executors. After the abstract had been delivered, the deed of release was discovered by the solicitor of the vendors, and an abstract of it was sent to plaintiff. It bore a 85s. stamp, and the sum paid in consideration of the release was not expressed in it. Plaintiff objected that it was improperly stamped, and required that the executors should concur

in the sale. The executors refused to do this, and the vendors thereupon gave notice to rescind the contract, and offered to return the deposit; but it was held, in an action by the purchaser against the vendors, that the stamp was sufficient, and that the purchaser was not entitled to require the concurrence of the executors in the conveyance. That the vendors had not complied with the condition which bound them to deliver an abstract within ten days; for that condition required them to deliver a full and fair abstract, whereas the abstract delivered was a misleading one, showing a title in A., B., and C.'s executors, the real title being in A. and B. And it was held, that for this breach the purchaser was entitled to nominal damages.—(*Steer v. Crowley*, 32 L. J., C. P. 191.)

NUISANCE.—The provisions in the 5 & 6 Will. IV., cap. 50, s. 70—whereby it shall not be lawful to erect a steam-engine within twenty-five yards from any part of a carriage-way, unless such steam-engine be within some house or building, or behind some wall or fence sufficient to conceal or screen the same, so that the same may not be dangerous to passengers, horses, or cattle,—applies to the case of a portable steam-engine upon wheels, and drawn by horses, and used to drive a thrashing-machine within a barn, although such steam-engine was not in any way fixed in the soil.—(*Smith v. Stokes*, 32 L. J., M. Ca. 199.)

ORDER OF REMOVAL.—The pauper resided in the parish of B. with his wife for more than five years prior to May 1859, when he went to Cuba under a contract with a mining company to work for them as a miner, for a period of three years, at L.9 a month, of which L.5 was to be paid monthly to the wife of the pauper. It was always his intention to return to his wife and family at the expiration of the three years. He went to Cuba, and his wife and family continued to reside in the same house in the parish of B., receiving the allowance from the company for about one year and five months, when the pauper fell ill, and the wife became chargeable. On the 17th of November 1861, the pauper returned to England, and found his wife and family still residing at B., and he himself became chargeable there. It was held, the absence in Cuba was a break of residence so as to render the pauper removable from B.—(*The Churchwardens and Overseers of Wellington v. The Churchwardens and Overseers of Whitchurch*, 32 L. J., M. Ca. 189.)

COPYRIGHT OF DESIGNS.—The 6 & 7 Vict., c. 65, applies only to new designs having reference to some purpose of utility; and in order to obtain the benefit of the Act, the purpose must be specified in the description supplied for registration. And where a coachmaker caused to be registered, under 6 & 7 Vict., c. 65, a design for a dog-cart, specifying as the purpose of utility that 'higher front wheels could be used or closer coupling effected,' and the design consisted of parts 1, 2, 3, 4, of which 1, 2, and 3 had nothing to do with front wheels or closer coupling, and No. 4 was not new, it was held by the M. R. that no exclusive privilege was gained by registration.—(*Windover v. Smith*, 32 L. J., Ch. 561.)

DEED.—By a deed made in 1770, between the East India Company and Robert Lord Clive, after reciting that in 1766 five lacs of rupees, bequeathed to Lord Clive by a former Nabob of Bengal, and in 1767 three lacs of rupees, the gift of the then Nabob of Bengal, had been paid to the East India Company, and cash notes given to Lord Clive for the amount, and that in pursuance of a scheme therein recited for making a provision for officers and privates in the Company's service who might be disabled by age, war, or disease, Lord Clive had delivered up the cash notes to be cancelled: it was agreed between Lord Clive and the Company that the eight lacs of rupees should remain in the hands of the Company, and that the Company should allow yearly a sum equivalent to L.8 per cent. thereon, and that the Company and their successors should be perpetual trustees, subject to the proviso therein contained, of the said fund of eight lacs of rupees for the due application and appropriation of the interest and produce thereof, for the relief of invalid and superannuated officers and soldiers in their military service, and upon the Company ceasing to employ a military

force then for the relief of invalid and superannuated officers and seamen in their marine service; and the deed contained a covenant by the Company for repayment to Lord Clive, his executors, administrators, or assigns, of the full sum of five lacs of rupees, subject to a due proportion of existing charges, in case it should happen that the Company should cease to employ a military force in their actual pay and service, and also ships for carrying on their trade. In 1834 the Company ceased to employ ships for carrying on their trade. In 1858 the property (except only the capital stock), liabilities, and military forces of the Company were transferred to the Crown. It was held (by the House of Lords, reversing the decision of the Master of the Rolls), that the covenant was not to be regarded as a stipulation for the restoration of a trust fund, but as a covenant in gross, and that upon the true construction of 21 & 22 Vict., c. 106 (the Act transferring to the Crown the property and liabilities of the Company), five lacs of rupees were payable by the Secretary of State for India to the representative of Lord Clive, subject to the existing charges properly attributable to and payable out of the interest thereof.—(*Walsh v. The Secretary of State for India*, 32 L. J., Ch. 585.)

INCOME TAX.—By a marriage settlement, made in 1810, certain hereditaments were limited to the use that the intended wife might, upon the decease of her husband, receive a joint rentcharge in lieu and bar of dower, thirds and free-bleinch; and the rentcharge was to be payable without any deduction in respect of any taxes already imposed, or thereafter to be imposed, upon the hereditaments, or the yearly rentcharge, or the intended wife in respect thereof. It was held that, assuming the terms of the deed to amount to an express contract that the jointure should be paid free of income tax (which it would seem they did), still the income tax must be paid by the jointress, the 103d section of the 5 & 6 Vict., c. 105, prohibiting any such contract. Succession duty having been claimed by the Board of Inland Revenue as upon a succession accrued on the death of the husband, which occurred in 1856, it was held by the M. R., that having regard to the abandonment by the jointress of her dower and thirds, the settlement was clearly a contract 'for valuable consideration for money or money's worth' within the 17th section of 16 & 17 Vict., c. 51, and that no succession duty was payable. *Semble*—the decision must have been the same if there had been only the consideration of marriage.—(*Floyer v. Bankes*, 32 L. J., Ch. 610.)

INJUNCTION.—A tenant from year to year filed a bill against adjoining tenants holding under the same landlord, to restrain the erection of new buildings interfering with the free access of light and air to the premises occupied by him. The landlord thereupon gave the tenant notice to quit, and, at the time of the hearing, only eight months of the tenancy were unexpired; and it was held, by the Master of the Rolls, that the slender extent of plaintiff's interest constituted no sufficient reason for denying him the protection of the Court; and, it appearing that plaintiff had remonstrated with defendants previously to the erection of the new buildings, a mandatory injunction was awarded compelling defendants to pull them down. But, upon appeal, the Lords Justices held, that—though the extent of plaintiff's interest did not necessarily disentitle him to relief, yet it was a material ingredient for consideration; and as it was not clear that plaintiff had sustained material injury, the inconvenience to defendants of compelling them to pull down their building would be far greater than any which plaintiff could endure if the building were allowed to stand, and he were left to bring an action for damages—the bill ought to be dismissed without costs, without prejudice to any action plaintiff might be advised to bring.—(*Jacomb v. Knight*, 32 L. J., Ch. 601.)

PARTNERS.—A, carrying on business by himself, joined with B and C, carrying on business under the style of 'B & C,' in an adventure of a wholly different description from the usual business of 'B & C.' It was held, by one of the Vice-Chancellors, that the existence of the partnership between B & C

did not in itself afford any ground for inferring that the profits of the adventure were to be shared otherwise than if B & C had been separate traders; and that, in the absence of evidence of agreement to any other effect, the profits must be divided in equal third parts between A, B, and C. The adventure in question was for the supply of small-arms to a foreign Government; and the arrangement to tender for the supply was verbally come to without any distinct agreement respecting the division of the profits. In the contracts for supply subsequently entered into with the representative of the foreign Government, A signed separately, and B & C were made parties by the name of their firm, and signed in that character. It was held by the Lords Justices, on appeal, that the proper inference from the form and mode of execution of the contracts was that the adventure was undertaken by B & C as a firm, *i.e.*, as one person, conjointly with A as another person, and, consequently, that the profits ought to be divided in moieties, one to A, and the other to B & C, and they decreed accordingly.—(*Warner v. Smith*, 32 L. J., Ch. 573.)

RE-CONVERSION.—Held by Westbury, L. C., reversing decision of Stuart, V.-C., that land which, from being impressed with an absolute trust for sale, is personal estate in equity, cannot be re-converted into real estate by persons having only a defeasible title to proceeds of sale. To effect a re-conversion, there must be the concurrence of the absolute owners.—(*Sisson v. Giles*, 32 L. J., Ch. 606.)

SOLICITOR AND CLIENT.—Gift made in 1852, pending the relation of solicitor and client, by a client to his solicitor, by means of a parol direction on the part of the client to the solicitor to retain a sum of money in the hands of the latter belonging to the client, set aside by Westbury, L. C., on appeal upon a bill filed in November 1861, the relation of solicitor and client having continued from the time of the gift up to the early part of 1861, when it was terminated. Although a gift by a client to his solicitor may be influenced by proper motives, it is subject to be set aside unless there be clear evidence of removal of that pressure upon the client, which the Court always presumes where the relation of solicitor and client is proved to subsist.—(*O'Brien v. Lewis*, 32 L. J., Ch. 569.)

WILL.—Testator gave real and personal estate to trustees, upon trust to receive the rents of certain leasehold premises and pay the same to his daughter E, upon her sole receipt, for her separate use; but in case of the death of E before the expiration of the lease, then upon trust to invest and accumulate the rents and profits for the benefit of the children of E living at her decease. E died before the expiration of the lease, without children; and it was held by the L. J., affirming a decree of the Master of the Rolls, that E was absolutely entitled to the leasehold premises.—(*Watkins v. Weston*, 32 L. J., Ch. 609.)

BOTTOMRY.—It is a general rule, though not an universal one, that a master before hypothecating cargo, must, if it be practicable, communicate with the owners. A duty to tranship cargo in a foreign port, can scarcely, under any state of circumstances, be thrown upon the master. In considering a bottomry bond given in a foreign port, the Court is governed by the general maritime law, not by the *lex loci contractus*. Dr Lushington: In the case of 'The Grati-tudine' (3 C. Rob. 240), an imperial vessel, Lord Stowell exhausted all the authorities; and not a word is said, nor any authority cited, to show that any law should be applied to the case, save the ordinary maritime law. There is nothing mentioned of the *lex loci contractus*, nor of the law of the country to which the ship belonged. The same observation applies to the case of 'The Bonaparte' (18 Moo. P. C. C. 459), a Swedish vessel; and there are cases, almost without number, replete with observations to the same effect. In this case, therefore, and for the present, I must take as my guide the ordinary maritime law.—(*The Hamburg*, 32 L. J., Pr. & M. 161.)

CONFIRMATION AND PROBATE ACT.—The Court will not allow its seal to be affixed to an 'eik' or additional confirmation. If the original confirmation does not include the whole of the deceased's personal estate in England, the proper

course is to obtain a new confirmation.—(*In the goods of Hutcheson*, 32 L. J., Pr. & M. 167.)

ACTION.—The proprietors of a canal by deed granted to plaintiff the sole and exclusive right of putting or using pleasure-boats for hire on the canal; and it was held, this did not confer such an interest in plaintiff as to give him a right of action against another person for using pleasure-boats for hire on the canal.—(*Hill v. Tupper*, 32 L. J., Ex. 217.)

BILLS AND NOTES.—If the drawer of a bill of exchange, after the time for giving notice of dishonour has expired, promise to pay the bill, that is a waiver of notice; and if there is no plea of waiver, the Court will add such a plea. Byles, J.: A promise to pay may operate either as evidence of notice of dishonour, or of a prior dispensation, or as a subsequent waiver of notice. Whether made after, or even before, the time for giving notice has expired (inasmuch as notice may be given at any time within the limit prescribed by law), a promise to pay is always evidence from which a jury may infer due notice.—(*Cordery v. Colville*, 32 L. J., C. P. 210.)

RAILWAY.—A jury having found that no structural damage had been sustained by the premises in question, and having assessed the compensation at L.60 for the loss of trade by reason of obstruction only, on a case stated, without pleadings, after action brought, for the opinion of the Court as to whether loss of trade caused by obstruction was damage in respect of which the plaintiff was entitled to compensation, it was held that, on this finding of the jury, and on the authority of *Chamberlain v. The West End of London and Crystal Palace Railway Company*, plaintiff was so entitled, and that he was also entitled to the costs of the inquiry before the Sheriff's jury. Per Bramwell, B., and Wilde, B.: In assessing compensation to parties whose premises may be injuriously affected by works done under the authority of Parliament by a railway company, the company are not entitled to set off any benefit accruing to such parties, or to the neighbourhood, by the construction of the railway.—(*Senior v. The Metropolitan Rail. Co.*, 32 L. J., Ex. 225.)

RAILWAY.—A person having no greater interest in premises than as a tenant from year to year should proceed under the 121st, and not under the 68th section of the Land Clauses Consolidation Act. To a count for trespass to the house, defendants pleaded that the said house was delineated in the plans and described in the books of reference deposited as required by their Act, and that it was necessary to take and use the said house for the purposes of their Act, and that they entered and took possession of the said house with the consent of the owners and occupiers thereof, and after such entry and possession taken plaintiff took possession of the said house and occupied the same, and defendants, because it was necessary to the construction of their works authorized by that Act, entered the said house, plaintiff then being therein, and pulled down the same, etc.; and it was held, on demurrer, that the plea was good, and that the consent could not be revoked. To a count alleging that plaintiff was entitled to support for the same house from an adjoining house, and complaining that defendants wrongfully deprived the plaintiff of such support, to wit, by negligently and improperly pulling down the same without taking due care to secure the plaintiff's house against the consequences of such pulling down—defendants pleaded (except as to so much of the count as charged them with having negligently and improperly pulled down the adjoining house), that the same was delineated in the plans and described in the books of reference deposited as required by their Act, and that it was necessary for the purposes of that Act to enter upon and pull down the same; and it was held, on demurrer, that the plea was good; that the portion of the count to which it was pleaded stated a good cause of action.—(*Knapp v. London, Chatham, and Dover Rail. Co.*, 32 L. J., Ex. 236.)

THE

JOURNAL OF JURISPRUDENCE.

THE SHERIFF COURTS.

The History and Present Constitution of the Sheriff Courts of Scotland. By ROBERT ROBERTSON, Esq., Advocate, Sheriff-substitute of the County of Stirling.

(Continued from page 8.)

It is plain that to carry out Mr Robertson's views would involve the most sweeping changes in the Scotch system of local jurisdictions. To attempt this would take us far further than the mere substitution of one judicial officer for two ; it would render obsolete a large body of statute law, it would involve the redistribution into sheriffdoms of the whole country. Not that we would press such a consideration as in itself a valid argument against any proposal. This style of opposition has always been common and powerful. In the *nolumus leges Angliæ mutari* days, an expression of dogged obstinacy was enough for success. In our more reasoning, or it may be only less straightforward times, we generally endeavour to dignify an objection of this stamp with some appearance of argument. Perhaps the favourite way of doing so is that adopted by Mr Spenlow when repressing the enthusiasm of David Copperfield : 'It might not be a perfect system ; nothing *was* perfect ; but what he objected to was the insertion of the wedge. Under the Prerogative Office the country had been glorious. Insert the wedge into the Prerogative Office, and the country would cease to be glorious. He considered it the principle of a gentleman to take things as he found them.' We are far from esteeming highly Mr Spenlow's point of view, but there is a wide difference between twaddle of this kind and the rational position that the advocates of any important

change are bound to show: first, that change is required at all; and second, that the change proposed is likely to prove beneficial. The onus lies on them. Now, here Mr Robertson conspicuously fails. He has given us much false history, not a little bad law, some misrepresentation as to the work done by the Sheriffs and their Substitutes, and a good deal of irrelevant declamation; but, so far as we can discover, not one distinct reason for the abolition of the office of Sheriff. It might be sufficient to stop here—resting on the weakness of the attack. But the subject is too important to allow of such treatment; and therefore, looking to the interests of the public, it is worth while to consider whether any gain would result from the overthrow of the Sheriffs, and the reign of the Sheriff-substitutes in their stead.

The Sheriff, say the Commissioners of 1818, 'may still be described, in the language of Sir George Mackenzie, as the king's chief and ancient officer within the shire for preserving the peace and putting the laws into execution. His office is partly judicial, and partly ministerial.' In considering his office as judicial, we have to do mainly with his duties as a judge of appeal. The jurisdiction of a Sheriff Court is, as is well known, exceedingly extensive. It can hardly be necessary to dwell on this point by enumerating the large and important class of cases which these courts can entertain. Assuming then this fact as within the knowledge of all, and admitted by all, the next question is, how to make these courts as efficacious as may be. In the language of the Commissioners of 1834, 'As a very considerable part of the judicial business throughout Scotland, particularly in cases of small amount, is carried before the Sheriff Courts in the first instance; and as these local judicatures are, on this account, highly beneficial; and more especially, as in this country no circuits are made by the judges of the Supreme Civil Courts; we consider it a matter of great importance to follow out every means for their preservation and improvement, particularly by rendering them accessible at a moderate expense to the lieges, and removing as far as possible every impediment to the speedy administration of justice.' Adopting to the fullest extent these views of the Commissioners, we would urge that one of the best things in our Sheriff Courts, as they at present exist, their chief and peculiar glory, is the right of appeal from the Sheriff-substitute to the Sheriff.

Mr Robertson studiously endeavours to represent this right of

appeal as a thing of no account, and his language is cunningly directed to this end. To say that only the cases 'in the ordinary roll,' and, consequently, only one-twentieth of the cases actually decided by the Sheriff-substitute, are appealable to the Sheriff, is to put the thing so as to produce quite an erroneous impression on those unacquainted with the practical working of the court. The real state of affairs is this:—Under certain statutes—as, for example, the Burial Acts and the Registration Acts—review of the Sheriff-substitute by the Sheriff is either expressly excluded, or is held as excluded by the scope of the Act, the interpretation clause, etc. But it is to be observed, that these statutes are, as a rule, purely administrative, and refer to administrative work, which work, moreover, may be discharged *either* by the Sheriff or his Substitute. Then come the small debt cases; and it is these which run up Mr Robertson's proportion of nineteen-twentieths of non-appealable cases. Now the whole small debt jurisdiction stands alone, resting on special Acts of Parliament, and controlled by special regulations; among others, that requiring the Sheriff to hold one small debt circuit annually. The Small Debt Court is a thing by itself; in which, though there is certainly no appeal, the Sheriff is required by statute to take an active part. But it is idle to dwell on these peculiar exceptions. The broad truth is, that in the real judicial business of the Sheriff Court—including an extent of jurisdiction unknown to any other local courts in Great Britain—an appeal lies from the Sheriff-substitute to the Sheriff. But this is really a minor point; for if the appeal to the Sheriff is of such a nature, and so highly esteemed as we shall endeavour to show it to be, the fact of its being so limited even as Mr Robertson would have his readers suppose, may be a very good reason why it should be further extended, but can be no reason at all for its abolition.

The chief requisites of an appeal are, that it should be speedy, cheap, and to a competent tribunal. It will not be difficult to show that the appeal in question is all of these. It is certainly speedy, for it is unencumbered by forms to an extent amazing in any judicial proceeding. The process is simply sent as a parcel to the Sheriff in Edinburgh; and, if a hearing is requisite, it is delayed no longer than the next sittings; or, if these are too far off, a reclaiming petition may be ordered. Nor is it less certainly cheap. Without a hearing, the judgment of the Sheriff can be obtained for a sum ranging from two to five shillings; and the extra price of a hearing is

L.1, 1s. to the orator on each side. Mr Robertson would probably join issue with us as to the competency of the tribunal; at least he makes remarks on this subject which we cannot pass over, but which we notice with unfeigned reluctance. 'Just fancy,' he says, 'the case of *some young follower of the Lord Advocate*, a depute-advocate of some three or four years' standing, obtaining the appointment of Sheriff-depute, while the resident Sheriff is a senior member of the bar, who had been discharging the functions of a judge before the said depute was christened,' etc. We put the thing mildly when we say that these observations should not have been made. They are utterly irrelevant. To say that an office is by accident badly filled, does not force upon us the conclusion that the office should be abolished. The remark to which we have referred can only, therefore, serve the purpose of giving pain. That success does not always attend merit, is unhappily true. Did it do so, we should have realized the conditions of Plato's ideal state, 'when kings shall be philosophers, and philosophers kings.' And in our country the frequent divorce of reward from desert is part of the price we have to pay for a constitutional administration. But it would be hard to show that our Sheriffs, as a class, have strongly illustrated this weakness in human nature, or this tendency of parliamentary government. As a rule, the most eminent lawyers in the country have been Sheriffs. At any given time within the last century, the large majority of the Bench will be found to have been Sheriffs. And we see no reason to doubt that, for the future as in the past, our Sheriffs will generally be men fully equal to the task of reviewing the judgments of their Substitutes.

It is here that the question of non-residence comes in. For, as we before said, it was with the especial view of improving the appellate jurisdiction, that the statute of 1838 as it were imposed non-residence on the Sheriffs. Strangers to the system find it hard to divest themselves of the notion that non-residence involves neglect of duty. The late Lord Justice-Clerk told the Commissioners of 1834, that he had great difficulty in disabusing the mind of the late Sir Robert Peel, when Home Secretary, of that idea; but he added, that when the real nature of the system was explained to that statesman, he became strongly persuaded of its value and importance. So far, in fact, is the non-residence of our Sheriffs from being a sort of absenteeism, that it gives them great advantages in the discharge of their duties. These advantages have been often enumerated:

Mr Robertson forces us to enumerate them again. 1. It frees them from the influence of local prejudices and local feeling. We firmly believe that every judge would strive against such influences—often, doubtless, with success; but human nature is frail, and should not be exposed to temptation. More than this, it is of importance that the public, especially the poor, should not be led to fancy that such influences can have power to disturb justice. As Mr Barclay, the Sheriff-substitute of Perthshire, said in evidence before the Commissioners of 1834, ‘there may be no such thing; but it is sufficient that the existence of them is believed. I saw, the other day, in the Report of the Commissioners of the Common Law in England, that on this ground they object to the same judges going twice the same year to the same circuit. It is sufficient that the public think that the influence or prejudice does exist.’ 2. And this suggests the second advantage, *i.e.*, that the residence of the Sheriff in Edinburgh gives authority to his judgments, and inspires confidence in them. To quote Mr Barclay again: ‘A case is sent to Edinburgh, where the Sheriff resides, and the decision he gives is looked upon somewhat in the same light as if it were a decision of the Court of Session.’ 3. Residence in Edinburgh leads to uniformity in the decisions of our local courts. The great evil of independent local judicatures has always in other countries proved to be, that it leads to different rules of practice, nay, to different law in different districts. The risk of this great evil is avoided by the Scottish system. The Sheriffs, living in Edinburgh, and in attendance at the Parliament House, are familiar with the latest decisions of the Supreme Court, and are in constant communication with each other. Consequently, the law of the Sheriff Courts in Scotland has been always marked by a uniformity not less surprising than beneficial. And this benefit, it may be observed, has been prominently in the view of the Legislature. The Act of 1838—the statute which made residence in Edinburgh imperative—requires (sec. 32) the Sheriffs to meet at stated periods, and at any other times they may think fit, in the first week of the winter session, in order to ‘consider proceedings, and submit regulations,’ which, with the sanction of the Supreme Judges, are to be binding in all their courts; and the design of this enactment is declared to be, ‘the better to carry into effect the purposes of the said recited Act (the Jurisdiction Act) and of this Act, and to preserve uniformity in the proceedings of the Sheriff Courts.’ And that the Sheriffs have, with the best results, exercised the powers

hereby conferred upon them, even Mr Robertson will hardly dispute.

It is therefore no matter for surprise that the great weight of authority is adverse to change. Both the Commissions to which we have so often referred reported in favour of the present system.¹ The Commissioners of 1834, moreover, particularly notice that the evidence which they took 'in regard to the opinions and actual feelings of the country on the subject, greatly preponderated in favour of the existing system; for while in Glasgow the witnesses who were examined were much divided in opinion, the greater number even of those who were favourable to a change in this respect, allowed that they chiefly contemplated the peculiar situation of a large and populous jurisdiction like that of Lanarkshire. But the witnesses from every other part of Scotland, who were examined, were nearly unanimous in holding that any such change was not only unnecessary, but would be highly inexpedient.' We have already referred to the opinion of the late Sir Robert Peel, as represented by the late Lord Justice-Clerk; and we would add to it the authority of another eminent man, equally well qualified to judge, and equally beyond the risk of the imputation, even from Mr Robertson, of 'interested motives.' When this question was before Parliament in 1837-8, the late Lord Campbell, then Attorney-General, told the House that 'the system of Sheriffs-depute and Sheriffs-substitute was a system which he had always admired, and the more so when he compared them with the system in other countries. . . The advantage of the Sheriff-substitute was, that the law was thus brought home to the door of the poor man; and if anybody was dissatisfied, there was an appeal to the Sheriff-depute. Now, he thought it a great advantage to have an intermediate court of appeal between the Court of the Sheriff-substitute and the Court of Session. He maintained the opinion, that the Sheriff-depute was enabled to discharge his duty much better by attending to the practice of his profession during a part of the year in the Parlia-

¹ The Commissioners of 1818 were Sir Islay Campbell, Sir James Montgomerie, Bart., Messrs George Robertson Scott, M. Thriepland, and James Glassford; of 1834, Messrs George Joseph Bell, James Reddia, John Cuninghame, Robert Jameson, Andrew Skene, Andrew Rutherford, Adam Anderson, William Bell, and John Dundas. It is a very gross violation of propriety, that Mr Robert Robertson should stigmatize the labours of such men as the 'defeat of a desired remedy by the influence of the Parliament House,' and should impute interested motives to all who chance to agree with the opinions which they reported for the guidance of the Crown.

ment House in Edinburgh, than if he were to reside continually in a remote and distant county.' Besides all these distinguished authorities, there is a body of men eminently entitled to be heard in this matter—the practitioners before the Sheriff Courts. We should like to know what *their* views would be regarding the abolition of the appeal to the Sheriff. We do not believe that they have changed from what they were in 1834. In the November number of the *Scottish Law Magazine*—a journal especially devoted to the Sheriff Courts, and therefore likely to represent truly the feelings of the practitioners therein—we are assured that 'the present state of the machinery of the Sheriff Courts seems fully adequate to the discharge of the greatly increasing business before it. It is cheap, speedy, and at the door of each litigant.' And on the special matter of appeal this journal says, 'The very existence of the right, and the knowledge that it is in the power of a litigant to appeal an interlocutor, gives a confidence in the Sheriff Courts which would, we fear, not otherwise exist. We are decidedly adverse, therefore, to the abolition of the office of Sheriff-depute, for this reason, if there were no other, that one of his most important functions is that of an appeal judge.' These views are strongly confirmed by the *use* made of this right of appeal. Scotch judicial statistics are notoriously defective, or rather there are none at all; and if this question is to be seriously discussed, it would be a great service were some member to move for a return showing the number of cases brought into the Sheriff Courts, the number of decrees in absence, the number of cases which go no farther than the Sheriff-substitute, and the number of those appealed to the Sheriff and advocated to the Court of Session. But the figures annexed to the Report of 1834 give us some information as to the state of things at that time. We find that nearly a half of the cases decided by the Sheriff-substitute were appealed to the Sheriff, while the proportion of those advocated to the Court of Session was one in fifty-five; and, as bearing on the question of non-residence, we have the curious fact, that in four counties, each happy in a resident Sheriff, the number of cases appealed to the Sheriffs was, in all, 82 out of 990 decided by the Substitutes. Farther—looking still at the evidence of facts—is the Small Debt Court, where there is no appeal, popular? We think not. 'A Solicitor,' in an able pamphlet, published in 1853, denounced it vehemently. Mr Barclay regrets the want of review therein, as he is 'satisfied there are many rash and

very untenable judgments given in these courts.' And the late Lord Justice-Clerk, in his evidence already quoted, speaks of 'the very great dissatisfaction created with regard to the finality of cases even in that court' as a thing of which 'everybody is probably aware.' The Bill introduced last session by Mr Caird, Mr Dalglish, and Mr Mackie, 'to enlarge the Sheriff's small debt jurisdiction in Scotland,' was generally unpopular, and was specially reported against by more than one body of procurators throughout the country.

And here we have a most instructive fact to guide us. Section 23 of the Court of Session Act gives power to litigants in the Sheriff Courts of consent to have their cases, of whatever nature, disposed of as if in the Small Debt Court. We understand the instances in which litigants have availed themselves of this privilege have been exceedingly rare. Nothing, we think, can be more conclusive than this; and could there be a more uncalled-for proceeding than to force upon litigants what, when offered them as a privilege, they have rejected? It would appear, then, that the right of appeal to the Sheriff is fully appreciated. Nor is this to be wondered at: any arrangement which gives litigants cheap and expeditious justice at their own doors, and 'in combination with this a ready and inexpensive application of the higher judicial talents and knowledge of men of eminence in the law, removed from local influence, and familiar with the administration of justice in the Supreme Court,' must be popular. An appeal to the Court of Session could not be made as cheap and as expeditious if a bill for the improvement of that Court was passed every year. But it is to be observed, that under the present system the litigant is not shut out from the Supreme Court. He may go there if he likes; while, at the same time, a judicature necessarily quicker and cheaper is provided him, at which he may stop if content therewith; and the fact that so many do stop there, is a pretty strong proof that the public are not dissatisfied with that judicature. What the Sheriff-substitutes, who alone of the whole community object to this judicature, would substitute for it, Mr Robertson does not precisely say; but we rather apprehend, from a note at p. 28, that the only tribunal to which, in his opinion, the Sheriff-substitute can, without loss of dignity, submit their judgment, is the House of Lords.

But the judicial duties of the Sheriff are by no means limited to those of an appeal judge. It is a peculiarity of this judicature, that the Sheriff, while mainly a judge of appeal, is also the principal

judge of the Court, and can take cognizance of the proceedings of the Court at any stage, and at any time. This peculiarity is one of great value and importance. It is valuable with regard to all procedure; for the control of the chief judge, exercised from time to time, must have a useful effect in establishing a good style of pleading, and of conducting business generally. And it is of especial value and importance with regard to a large branch of the work of his Court, which may not, indeed, demand the most exalted judicial faculties, but the unimpeachable discharge of which is of vital consequence to the community. We allude to the police and magisterial duties which devolve on the Sheriff Courts. In Scotland, these Courts supply, in great measure, the place of the Quarter Sessions in England; and here the best local judge profits greatly by the control of a non-resident superior kept aloof from county feeling and prejudice. On this point we will again quote the evidence of the late Lord Justice-Clerk,—a man little inclined, by birth, politics, or association, to exaggerate the evils resulting from the influence of country gentlemen:—

‘I beg to add, that the experience of any man must satisfy him, that we never can expect to have any great proportion of the police and magisterial business of the country done by the Justices of the Peace in Scotland. Scotch country gentlemen generally do not like it; and the great nicety of many points under the Act 1701, involves them in unavoidable, but certainly most severe responsibility. Besides, there is a want of confidence in the people of Scotland as to that branch of business being done as well by them as by the Sheriffs. . . . In a narrow country such as Scotland, where almost every man in a county is known to another, it is very difficult to avoid the suspicion of injustice being done on the part of the country gentlemen.’ All these delicate and difficult matters then come before the Sheriff-substitute; and it is easy to see, with regard to them especially, of how much importance it is, as the evidence from which we have quoted goes on to show, to maintain his office in the highest possible responsibility, and to keep constantly over it the control and superintendence of a non-resident superior. Nor, in enumerating the judicial work of the Sheriff, should his extensive criminal jurisdiction be forgotten. All crimes may be tried in the Sheriff Court, save the four pleas of the Crown; and what cases are so tried, depends entirely on the discretion of the Crown as prosecutor. This

work, which is very considerable, may be done either by the Sheriff-substitute or the Sheriff; but our hardest-working Sheriffs endeavour, when it is at all feasible, to take themselves all cases which are ordered to be tried with a jury.

Now, all this work is done, and litigants are provided with a court of appeal with which, as we have shown, they are well contented, at what cost? The average of the salaries of the Sheriff-substitutes is, we believe, L.627 a-year. The average of the salaries of the Sheriffs is L.650 a-year. Therefore both averages put together do not amount to the average of the salaries of the English County Court judges, which range from L.1200 to L.1500 a-year. What, we should like to know, is the public likely to gain by any change in a system such as this?

We must now consider the Sheriff in his ministerial or administrative capacity. To judge fairly of his office, we must regard him not only in his relation to the Sheriff Court, but in his relations generally to his sherriffdom. These are numerous, constant, and onerous. On him, to the exclusion of his substitute, rests the duty of preserving the public peace. In all cases when that peace is threatened, he must instantly repair to his county, and Government holds him directly and solely responsible for all disturbance. On him also rests a more general responsibility for the whole state of his county in regard to crime; and it is in this respect mainly that he is required to attend at the Circuit Courts held by the judges of the Supreme Court, although he may be also there called upon to answer for any dereliction of duty in matters civil. He is *ex officio* a Commissioner of Supply,—he has to inspect jails and asylums, and report on the state of the county records; and, besides, certain Sheriffs are, *ex officio*, members of important Boards,—as the Board of the Northern Lighthouses, the Board of Supervision, and the Lunacy Board. As Collector of the Ancient Revenues of the Crown, he is accountable yearly in Exchequer, according to the Act 1663, c. 2, confirmed by 6 Queen Anne, c. 26. His duties in this capacity are not light. All payments by Exchequer are made by him, and no public monies are advanced, or otherwise disbursed, but on his receipt; and for these monies, as also for all sums levied, or which it is his duty to levy, under Exchequer process, he is held personally liable. He is the medium of communication between the local functionaries on the one hand, and the Government officers and public Boards on the other,—as, for instance, the Lord Advocate, as public prosecutor,

and as representing the Home Secretary, the Officers of Exchequer, the Registrar-General; the Board of Works, the Board of Supervision, etc. Lastly, he is the returning officer at elections, and holds in person the Registration Court, in which he discharges the duties, and saves the country the fees, of the English revising barrister.

Obviously, many of these functions are such, that to their complete and speedy performance, the Sheriff's residence in Edinburgh is necessary; and for the satisfactory performance of perhaps all of them, his non-residence in his county is necessary. Those in any way connected with politics plainly fall under the latter class. But, indeed, in every matter of local and administrative business, while constant communication between the Sheriff and his Courts is desirable, very intimate familiarity is far from desirable. It brings him into the confidence of some country gentlemen; it involves him, possibly, in unpleasant collision with others; and in any case, it weakens and deteriorates his position as a judge. It can hardly, we think, be disputed, that the discharge of county business is facilitated by the Sheriff's residence in Edinburgh. He is thereby enabled to communicate easily and directly with Government officials; and when he visits his county, he can generally manage to smooth over local difficulties which a resident judge might find insuperable.

The result, then, of the whole is, that for salaries, amounting, on the average, to L.650 a-year, each county retains, firstly, as chief magistrate, a man resident at the centre of government, and yet always at their command; and, secondly, as a judge, a good lawyer, in attendance and practice before the Supreme Courts. We should like much to know what those who are so anxious to destroy this system propose to raise up in its stead. They favour us with no distinct deliverance on this point; and till they do so, we shall be slow to believe that they have anything better to propose. Are the Sheriffs to be altogether swept away? In that case, how is even the administrative work of the various counties to be carried on? Even in small counties, where there is only one Sheriff-substitute, would he be able to undertake all this duty in addition to the present labours, which are represented as so grievous? And difficulties yet more complex encompass us when we take the case of counties where, either from extent, as Argyllshire, or population, as Edinburgh, there are three or four Sheriff-substitutes. If one of these is to be selected as the chief magistrate of the county, and required to do all this work, to the exclusion of

the others, he will hardly do it for nothing ; and so what do we come to but a modification of the present system ? If, on the other hand, all are to be on the same footing, and this work is to be discharged by all equally, we shall have a redivision of Scotland into new judicatures, hardly compatible with the existence of the present counties. And, what is a yet more serious objection, the right of appeal, so much exercised and so much valued, would be altogether taken away. It is idle to talk of an appeal to the Supreme Court ever being made an equivalent for the present appeal to the Sheriff, so far as the bulk of the community is concerned. Only in some legal millennium can it become as cheap and as speedy. By destroying the present appeal, local judges might gain in importance, and the junior bar in Edinburgh might gain in practice ; but however desirable these ends may be, they would be dearly attained by denying to the masses of the people the privilege of appeal, and depriving them of the comfortable feeling, that even for the smallest matters a careful and competent review is within their reach. We would leave this matter with confidence to the decision of the public, who are as deeply interested in the due administration of justice as the Sheriffs, and perfectly cognizant of the merits of the question. How would the population of Stirlingshire, for example, receive a proposal to leave them alone with the law of Mr Robert Robertson, without any nearer control than the Supreme Court ?

But some reformers, while shrinking from any such change as this, yet lean to the notion of reducing the number of the sheriffdoms, by throwing several into one. This plan can be plausibly supported ; but the arguments in its favour will not bear close examination. It has been carefully considered both by Commission and by the Legislature. The Commissioners of 1834, while enforcing the propriety of a redistribution of the jurisdiction of certain Sheriffs as then existing, and while suggesting that some of the smaller counties might be with advantage united into one sheriffdom,—suggestions which have been since carried out,—at the same time expressed themselves decidedly opposed to anything like so sweeping a measure as the uniting of sheriffdoms ‘so as to place large districts within the jurisdiction of one principal Sheriff.’

‘We conceive,’ they say, ‘that this is a proposal of very questionable expediency. So long as the Sheriffs’ jurisdictions are limited, as at present, to districts of moderate extent, the duties of many of them may be discharged by counsel in considerable practice. But

if sheriffdoms are to be combined with the view of equalizing the districts, and bringing the whole local business of Scotland under the review of a few principal Sheriffs, this would just be one mode of rendering it impossible for a practising advocate to hold the office. This, upon the views already expressed, we consider a very inexpedient and unsuitable change in the constitution of the office; and if widely-extended counties were combined under one Sheriff, the greater part of the district would derive almost as little advantage from the actual residence of the judge as if he were resident in Edinburgh. We are the less inclined to recommend the combination of sheriffdoms, as it appears to be admitted that it will be attended with no real saving of expense to the country. On the contrary, the plan proposed by the greater number of those who have proposed the change now under discussion, is to accumulate the salaries payable at present to the Sheriff separately, so as to afford a large provision for a few Sheriffs to be appointed for the new districts as combined. But we apprehend it is better for the litigants, and for the public generally, that the professional duties of remote and widely-extended districts should be discharged by separate Sheriffs practising at the bar, as at present, than that by any accumulation a larger provision should be made for a single judge retired or withdrawn from practice.'

It would be difficult, and it is needless, to add anything to this cogent reasoning. The principle of the present system is, to give each county the services of a chief magistrate and an appeal judge at a small expense, *because* he is allowed to be a practising advocate. The moment you prevent his pursuing his profession by making him the judge of a district, you violate the essential idea of the system. And in what respect would the violation be an improvement? It would save the country no money; for the new district judge, being required to give up his profession, would easily absorb the salaries of three or four Sheriffs. It is difficult to see that the appeal work would be better done: for unless the salaries were beyond all reason, the new officials would be in no way superior to the present Sheriffs; nay, as composed of men who had voluntarily relinquished the highest prizes of their profession,—that is, who had failed in it,—they would, as a rule, be inferior to them. It is still more difficult to see how the administrative work could be done at all,—at least without totally new arrangements, involving great additional expense. The scheme would only serve the purpose of creating an intermediate

class of judges, whose existence, without other duties or professional interests, we should regard as a very questionable good for the community. The Scotch public have yet to be convinced of the superiority of the English County Court judge over their own Sheriff.

Nor can we discern any probable benefit from decreasing the number and extending the jurisdictions of the Sheriff-substitutes. Here, too, we should look at the principle, or essential idea of the system,—that is, to have resident officials, at once judges and magistrates, so distributed over the country as to bring justice to the doors, as it were, of the whole community. Speaking roughly, these men, with the aid of their superior, do the work of the English County Court judge, of the Coroner, of the Quarter Sessions, besides all the work connected with the Scotch system of public prosecutions; and it is therefore plainly essential that they should be ‘scattered broadcast o’er the land.’ Accordingly we pay them, not merely for the actual work they do, but for residing in out-of-the-way places, where they may have very little to do, but where it is necessary that the law should have a resident representative. We buy their time, it may be their comparative exile, as well as their actual services. Clearly this is for the advantage of the public. The people of Argyllshire, for example, are much better off with a Sheriff-substitute at Inverary, another at Campbelton, and a third at Tobermory, than if they had only one resident judge in the county—even although that one might be three times as rich and three times as important as any of those now existing. In fact, every one would lose by this change, save the fortunate individuals who might contrive to absorb the emoluments of the new office.

Dismissing from view, however, these organic changes, it is alleged that the Sheriff-substitutes suffer certain grievances which are susceptible of a direct remedy. Any complaint of this sort should, as we have before said, meet with ready attention. Even the indiscreet advocacy of Mr Robertson must not blind us to the merits of his case. And the Sheriff-substitutes are a class of men, beyond all question, entitled to a courteous hearing touching any matter wherein they feel aggrieved. On the matter of the inadequacy of their salaries, for example, we are in no way inclined to join issue with them. So long as the nature of their office, and of the office of Sheriff, is left on its present footing, the most important interests of the public are secure; and all questions of ways and means may be safely entrusted to the Exchequer. At the same time, this complaint

contrasts curiously with what we hear from other quarters. Professor Blackie regards the wealth of Sheriff-substitutes as an ideal state, after which all Scotch teachers and men of learning must sigh in vain. And, in fact, the average of their incomes exceeds the average of the incomes of ministers of the Church of Scotland, exceeds the average of the incomes of our Professors; nay, it exceeds the average of the incomes even of the Professors in Arts in Glasgow University, who are the richest in the country. We are not aware that the education of the majority of our Sheriff-substitutes has been so extensive and thorough, or that their learning is so profound, as to entitle them to larger incomes than our clergymen and our professors; on the enjoyment of which incomes, it should also be remembered, they enter at an earlier age than the professors at least, and in return for which they perform less arduous duties. Yet if any Sheriff-substitute could show that he is underpaid for the amount of work he actually gets through,—and some of them, as, for instance, the Sheriff-substitutes of Perth, Dundee, and Paisley, might very easily show this,—an increase of their salary would be as generally well received as it would be unquestionably just and expedient.

Another grievance of which the Sheriff-substitutes have complained, though Mr Robertson has not referred to it in his pamphlet, is that they are seldom visited by the refreshing dews of professional promotion; and an attempt was made to correct this in the bill of last session. The attempt was foolish, for the matter is beyond the reach of legislation. What did the framers of the bill imagine they had achieved by inserting a clause making Sheriff-substitutes eligible for promotion? They were so eligible before the bill was dreamt of; and if a dozen statutes were to repeat the unnecessary declaration, their promotion would continue as infrequent as it has heretofore been. For the reason of its infrequency is in the nature of things, and can be affected by no Acts of Parliament. In all professions, like the bar, where success is distant and uncertain, the rule obtains, that those men who accept, early in their career, the small but comfortable appointments which may be placed within their reach, are held to have given up the highest prizes. They have shrunk from the anxieties, from the sickness of hope deferred, ending often in the bitterness of eventual disappointment, which, in a greater or less degree, throw a shadow over every active professional life; and they have accordingly lost hold on those rewards, the very chance of which can compensate for all these.

They have chosen early, if frugal ease and comfort, and they must abide by their choice. They cannot both eat their cake and have their cake. It is the Eastern story : those who fail in the toilsome struggle up the mountain must remain where they have turned aside ; final triumph can be gained by those only who turn a deaf ear to all dissuasions, and press on steadily towards the golden fountain. Moreover, it is the men who continue in active work who acquire the distinction which at once compels and justifies promotion. The places of those who have retired from the struggle are soon filled up with others more patient, or more sanguine, or more powerful. These latter wait long on opportunity, until opportunity in turn waits on them ; and then they can perform services and establish claims which necessarily and rightly throw into the shade the most meritorious discharge of useful but obscure duty. This is no grievance peculiar to Scotch Sheriff-substitutes. It is the same everywhere. The English bench is not filled by County Court judges. So far as there is anything peculiar in the position of the Sheriff-substitutes, it goes to make their complaint on this point signally inappropriate. To make it a *rule* that Sheriff-substitutes should be promoted to sheriffdoms, would destroy the whole system. The principle of the system is, as we have often said, that the Sheriffs should be men at once sound lawyers, and actively engaged in their profession. Sheriff-substitutes promoted into Sheriffs might be the former, but never could be the latter. Plainly not. They can have had no business to speak of when they left the bar, or they would not have taken the office ; they have been away for many years, while younger men have been coming up to fill their place—which can hardly be supposed to better their chances. The establishment of such a rule, therefore, would simply lead to the result that our Sheriffs would all be men who had failed in their profession and grown old. Such a consummation would be most undesirable, in the interests even of the men themselves. A Sheriff-substitute, resident in his county, is not indeed a rich man ; but he occupies an important office, and stands high in public esteem. The same man transmuted into a Sheriff, and forced to live in Edinburgh on an income not larger, is a much poorer man, and much less respected. In Edinburgh, jostled by the younger men who have outstripped him in the professional race, he is nobody ; even when he visits his county, his position will be one of less dignity than if he had remained a Sheriff-substitute.

At the same time, we would only be understood as arguing against any legislative enactment on this matter—against any binding rule being laid down. And most especially would we regret at being supposed to have indulged in any disparaging remarks regarding men to whom professional success has been denied. Nothing could be in worse taste, or more untrue. For who can look at any profession without wonder at unappreciated merit, and yet greater wonder at empty pretentiousness in high places? And we can easily conceive the case of a Sheriff-substitute so eminent by long and distinguished service, as to make his promotion justice to himself and a gain to the public. In all such cases the promotion should be offered; but there is a wide difference between such a befitting recognition of merit, and an express statutory declaration that Sheriff-substitutes, *as a rule*, should succeed their Sheriffs. Such a declaration could only do harm, if it proved anything but a dead letter.

Mr Robertson's mistake has been in attempting too much. In order to better the position of the Sheriff-substitutes, it was not necessary to attack the Sheriffs. Had he confined himself strictly to this object, he would have deserved and received support. But proposals in themselves just and expedient, may be imperilled by rash and intemperate advocacy. Mr Robertson's pamphlet will only injure those whom he seeks to befriend. At the same time, it is the duty of impartial men to separate the cause from the pleader. The incomes of a few of the Sheriff-substitutes should be increased. All of them should be allowed longer vacations, and any other claims which they may urge should be carefully considered. But beyond such and such-like matters we should not go. Anything like radical change in our Sheriff Courts, as they now exist, is earnestly to be deprecated in the interests of the Sheriff substitutes themselves, in the interests of the profession at large, and, what is of far more importance, in the interests of the public.

While these sheets were passing through the press, Mr Robert Robertson again boiled over in the *Stirling Observer*. We really cannot go back upon the question of the historical position of the office of Sheriff, further than to express our admiration of the ingenuity of the device with which Mr Robertson escapes from the authorities we cited—*i.e.*, a suggestion that the report of the Commission of 1818 was written 'probably in forgetfulness of the terms

of the Act!’ Unfortunately for the value of this suggestion, that Report was written by Sir Islay Campbell, *not* by Mr Robert Robertson. We are, however, glad to remark that on one main point of difference we have converted Mr Robertson. In his first letter he said that the Sheriff-depute, ‘in so far as regards the highest class of cases in his Court (the ordinary action roll), *can do nothing in the first instance*; for, until a deliverance has been given by the Sheriff-substitute, his interference is *illegal and incompetent*.’ In his last he says, ‘the Sheriff-depute, practically at least, *whatever he may be in theory*, is now merely an appeal judge.’ We wonder very much which of these statements Mr Robertson wishes his friends, the ignorant Scotch M.P.’s, to believe. In the matter of language our worthy Sheriff-substitute improves upon us. At first, those who did not agree with him were merely ‘not honest,’ and exposed to the imputation of ‘interested motives.’ In the article in the *Stirling Observer* of 10th December 1863, a hostile critic is, with a deep mysterious humour, called Mr Bumble, and reproached with his ‘tallowy complexion;’ and now the said critic is ‘a petulant and ill-informed person,’ an ‘anonymous scribbler’ (this charge, foolish at best, comes with much propriety from the man who, if he did not originally write, added to, adopted, and circulated the anonymous article of the 10th December), a ‘most absurd and ignorant interrogator,’ ‘either grossly and shamefully ignorant, or deliberately and intentionally mendacious.’ Poor fellow! We have seldom seen bad temper betray so manifestly the defeated controversialist.

LAND REGISTERS—GLASGOW REPORT.

Report by the Committee of the Faculty of Procurators in Glasgow upon the Registers of Land Rights.

IN a former article¹ we gave an analysis of the Report by Messrs Morton and Bannatyne on the County and Burgh Registers of Land Rights for Scotland, which, as our readers are aware, was presented to Parliament last session, and circulated amongst the profession with the view of laying a foundation for legislation upon this important subject. Since that time, the Report has been under consideration by committees appointed by the Society of Writers to the Signet, and the Faculty of Procurators in Glasgow. In the present article we propose to consider the suggestions of the latter body as embodied in their Report presented to the Faculty, and approved of on the 7th of January last. The Report of the Glasgow Committee appears

¹ *Journal of Jurisprudence*, Vol. VII., April 1863.

to us to have special claims upon the attention of the profession, not only on account of the fair and thoroughly practical spirit in which that body has dealt with the recommendations of the Commissioners, but also because the Report has especial reference to a point which does not appear to have been sufficiently considered by the Commissioners, and upon which the Glasgow Faculty, who are chiefly interested in the matter, are well entitled to be heard. We refer, of course, to the question of the continuance of the local register for the regality of Glasgow.

In order that the peculiar position of this register may be understood, and the advantage or disadvantage resulting from its continuance as a separate record duly appreciated, it is necessary that the propositions of the Commissioners with regard to the consolidation of the registers should be kept in view. The objection to the continuance of this register is, of course, that it involves an interference with the plan of the Commissioners as a general measure applicable to Scotland. If the continuance of exceptional registers of this description can be shown to constitute an obstacle to the accomplishment of the large and beneficial project of the Commission, there can be little doubt of the direction which the opinion of the profession is likely to take in regard to it. Local interests must bend to considerations of general polity. The convenience of the profession at large, and of the public, as interested in the economical transference of lands, are of greater consequence than the inconvenience to which the profession in Glasgow may be subjected by the removal of their records to the General Register House. The Glasgow Faculty, however, are at issue with the Commissioners on the question of the necessity for complete amalgamation, and we are inclined to think they have shown good reasons for differing from the Commission in this matter.

The main propositions of the Commission are, as our readers are aware, (1) that the double Register of Sasines and of Inhibitions, and the Registers of Adjudications and Interruptions of Prescriptions, should be discontinued; (2) that, for the future, one Register of Sasines, in which Interruptions of Prescriptions are to be recorded, should be kept in Edinburgh, a distinct series of volumes being devoted to each county; (3) that one Register, applicable to the whole of Scotland, should be kept in Edinburgh for Inhibitions and Adjudications; and (4) that the Burgh Registers of Sasines should continue to be kept as hitherto. These propositions in themselves are

sufficient to afford no slight measure of relief to purchasers, both as regards saving of expense, and the diminution of the risk of error in consequence of one search only being required against the lands, and one in reference to persons. They are also essential to the safe accomplishment of the Commissioners' plans for facilitating searches of incumbrances by means of a parish index of names of persons, and a search sheet applicable to the subject of conveyance. On the other hand, it appears that, in the opinion of the Commissioners, the retention of separate burgh registers for property situated within the limits of royal burghs, is not incompatible with their plan for the amalgamation of the county registers. The objections to the double registers for counties are the expense and hazard of a double search, and the impossibility of preventing the abridgment from falling into arrear. But neither of these objections are applicable to the continuance of the burgh registers on the footing recommended by the Commissioners, which is, that subjects within the burghal district should be registered *only* in the burgh register. That being the condition, there is, of course, only one search and one abridgment for these districts. The searching and abridgment may then be performed by local officials under the supervision of the central authority. In this way, the districts included in the burgh registers are completely segregated from the general system of registration carried on in Edinburgh, as much so as if they belonged to a different jurisdiction.

The proposition of the Glasgow Faculty is, that the regality of Glasgow should be treated as a burgh district for registration purposes, which it is in substance, though not in name, under the existing system. The district in question is already almost entirely urban, and will be entirely so in a few years if the city continues to increase as it has been doing. Both in area and in population it is very considerably larger than the proper burgh of Glasgow; and the transactions affecting property in the regality are very much more numerous than those which enter the burgh register. There is this difference, however, in the circumstances of the two districts, that the regality property is entirely feudal, while the property situated within the burgh is partly feudal property, but chiefly burgage. If, therefore, the reasons which make it expedient to localize the burgh registers were in any way connected with the tenure of land in these districts, the regality of Glasgow could have no claim to be put in the category of the local registers. But are

there any such reasons? If the tenure of all the lands in Scotland were to be changed by Act of Parliament, and assimilated to burghage tenure, the reasons for consolidating the county registers and transferring them to Edinburgh would be just as strong as before. If, on the other hand, the occupiers of burghage property were for the future made to hold feudally of the Crown, the change of tenure would afford no reason for a corresponding change in the manner in which the record of the title-deeds ought to be kept. That such is the opinion of the Commissioners, we infer from a passage quoted in the Report of the Glasgow Faculty, in which the Commissioners give it as their opinion, that it would be expedient to have the burgh registers declared to be 'the only competent registers for registration of the titles of all *fiefs*, as well as of the registration of all property within burghal territory.' The true reasons for the proposed separation of the burgh registers from those of the counties are, as we apprehend, 1st, That transactions affecting burgh property are almost entirely confined to the burgh or city in which the property is situated, and carried through by resident agents; 2d, That the transactions being very numerous, when considered in relation to the area of the district, the business of searching is facilitated by their separation from the landward part of the county; and 3d, That the abridgment and classification of the records of burgh transactions may be best performed by registrars residing in the district, and having the advantage of local knowledge. To these we may add the negative reason, that nothing would be gained by amalgamating these registers with the general register; because it seldom happens that transactions in burgh property are contained in the same deeds with conveyances of landed estates.

These considerations appear to be directly applicable to the Register of the Regality District of Glasgow. The reason which we have placed second in order, and which is probably first in importance, applies to this district more strongly than to any other burgh district in Scotland; because, in fact, the number of transactions within the regality is so great as to make it a matter of absolute necessity that it should be continued as a separate registration district. The only question open for consideration, is whether, being so retained, the registration should be performed in Edinburgh or in Glasgow. The proposed translation of the county registers to Edinburgh may be justified upon two grounds,—1st, On account of the saving of expense in many counties where the number of trans-

actions is not sufficient to defray the expense of a proper staff of trained officials; 2d, Because of the many objections against the breaking up of the general establishment in Edinburgh, as explained in the Commissioners' Report, and which were more than sufficient to counterbalance the inconvenience which might be experienced by the local profession in consequence of the abolition of the local registers. Neither of these objections apply to the particular case in question. There is no question as to supplanting the register at Edinburgh, and there is no doubt that the regality register, if kept in Glasgow, would be self-supporting. As to the interest of the profession in Edinburgh, it appears from the Committee's Report that it is extremely small. In 1860, the number of deeds recorded in the Particular Register for the regality district was 1830, as compared with 154 recorded in the General Register at Edinburgh. It also appears that in 1860-61 and 1862, 96½ per cent. of the regality writs recorded at Glasgow were presented at the office for registration, while only 3½ per cent. were sent by post; so that the proportion of deeds recorded in that register by any other than Glasgow agents is very small. The number of deeds recorded in that register is now upwards of 2000, being little less than 1-7th of the average number recorded in the general and particular registers for all Scotland, royal burghs excepted.

We must reserve our observations upon the other topics suggested by the Glasgow Committee's Report for another article. In the meantime, we hope the subject will not be shelved, like too many matters referred to Royal Commissions, but that such a hearty support will be given to the recommendation of the Commission as may encourage the Government to bring in and persevere with a measure founded upon it.

A STATISTICAL PARADOX EXPLAINED.

MR BOYD KINNEAR, in the pamphlet which we have elsewhere noticed, discharges a Parthian arrow at the Court of Session reformers, in the shape of a 'Note A.,' upon the statistics of English Common Law Procedure. The figures which he gives are quite fallacious, as we shall immediately show; and that no injustice may be done to the author's meaning, we reprint the passage. It is in the following terms:—

NOTE A.—It was stated at the Social Science Meeting by the supporters of the Court of Session Bill, that since the reform of Common Law Pleading in England in 1850, the business before the Courts has greatly increased. This is an error. In the four years preceding 1850, the average writs issued (which means causes commenced) was 100,828; in 1862 (which rather exceeded the average of three preceding years), it was 103,564. Prior to 1850, the appearances entered averaged annually 54,194; in 1862 *there were only* 27,643. It was estimated that, prior to 1850, only 2 per cent. of the actions commenced ever went to trial,—a proportion which still holds,—the number of trials (including those which were unfounded, a considerable proportion) being in 1862 only 2204.

Greatly improved, therefore, as the procedure has been, the business in the Courts is not only not increasing—not even in proportion to the population—but is actually diminishing,—a fact well known to all practitioners in England. It is the happy result of greater national prosperity, which enables debtors more easily to pay—of simplification of law, which obviates many disputes—and of improvement of practice, which gives less cover to chicanery and more aid to justice. The diminution of litigation, in whatever country it takes place, is matter for public congratulation, not for statutory remedy.

Mr Kinnear's note, it will be seen, is founded on *three* statistical facts, from which the inference is drawn, that the 'simplification of the law' effected by the English Common Law Procedure Acts has not been followed, as had generally been supposed, by an increased resort to the Superior Courts of that country. Our observation is, that the figures which he quotes are imperfect, and that a fair comparison of commensurate periods prior and subsequent to the passing of these Acts, leads to a directly opposite conclusion.

(1.) *Writs Issued.*—The comparison instituted by Mr Kinnear is between the *four years* preceding 1850 and the *last year* for which statistics have been obtained, 1862; the average number for the former period being 100,828; for the latter, 103,564. The four years preceding 1850 include the year 1846, being the year before the establishment of the County Courts, and when, therefore, the Courts of Westminster Hall were practically the only tribunals available for the prosecution of ordinary actions. In that year the number of writs issued was necessarily very much higher than in the immediately succeeding period, the exact number being in fact 129,499. A fairer comparison would be between the average of the years 1847–8–9, and the average of the years 1860–1–2. The numbers are, for the former period, 91,271; for the latter period, 105,144, *being an INCREASE of upwards of 15 per cent.* upon the number of writs issued for the period subsequent to the Common Law Procedure Acts.

The real increase would be seen to be much greater, if the materials for a proper comparison existed, because the returns for

the period 1847-1849, obtained by the Common Law Commissioners (from whose first Report these figures are taken), exhibit a progressive decline; and it is well known that the extension of the County Court jurisdiction in 1850 to cases of the value of L.50 (instead of L.20), caused an alarming decrease in the business of the Common Law Courts during the next two or three years. Unfortunately, the publication of the annual volume of judicial statistics only commenced in 1859, and we believe there are no returns for the intervening period. It is, however, the universal opinion of the practitioners in Westminster Hall, that the gradual restoration of their business is due in a large measure to the simplification of procedure introduced by the Common Law Procedure Acts.

(2.) Mr Kinnear's next comparison is founded on a pure misapprehension. The number of *appearances entered* for the four years prior to 1850 was 54,194 (49,480 for the three years before that period). The appearances for 1862 were only 27,643. Mr Kinnear does not appear to be aware that the difference between these figures represents the effect of a change in the formalities of procedure. Prior to 1852, if a defendant did not appear, 'distringas' was used to compel appearance, and ultimately a fictitious appearance was entered for him by the plaintiff. By the 26th and 27th sections of the Act of 1852, these forms were abolished, and the plaintiff was allowed to sign judgment in absence without entering an appearance. The fair comparison, therefore, would be between the *judgment obtained* for these periods. We have made the comparison, and the numbers are as follows: Average of final judgments for the three years 1847-8-9,—23,032; do. for the three years 1860-1-2,—37,546; difference 14,514, being an INCREASE of *sixty-three* per cent. in the average number of final judgments obtained for the period subsequent to the Common Law Procedure Acts.

(3.) Mr Kinnear observes, that the proportion of cases that went to trial, as compared with writs issued, is nearly the same for the period before and subsequent to the legislative changes in the procedure of the Common Law Courts, being about two per cent. This statement also is strictly correct; but the proportion being the same, it follows that the number of cases tried has increased. The number of cases disposed of *causa cognita*, has, however, increased in a much greater ratio; because it is well known that a very large number of causes are now referred to barristers by a judge's order, under the compulsory powers conferred by the Procedure Acts. It

does not admit of reasonable doubt, that the enormous increment of sixty per cent. in the number of final judgments includes many cases disposed of in this way, and which, under the former practice, could not be disposed of at all, because the machinery of the Court was not adequate to overtake the business. We have only further to observe, that, in our opinion, an increase in the number of cases finally decided is the best of all tests of the success of a measure of forensic reform; because it represents so much additional justice done,—so many cases in which, but for the reform, the parties would have submitted to injustice rather than bring their claims before a court of law.

We subjoin a detailed statement of the figures on which the foregoing observations are founded.

From Report of Common Law Commissioners, 1851, page 35, and Appendix D.

	1846.	1847.	1848.	1849.
Writs issued,	129,499	97,274	91,680	84,860
Appearances entered,	65,335	54,122	49,914	44,406
Final judgments,	26,409	24,728	23,589	20,829

From 'Judicial Statistics,' annually presented to Parliament.

	1860.	1861.	1862.
Writs issued,	97,568	114,301	103,564
Appearances entered,	25,582	29,100	27,643
Final judgments,	35,175	41,297	36,166

EXPENSES IN THE HOUSE OF LORDS.

A COMMITTEE of the Faculty of Advocates has been sitting for several months upon the Court of Session (Scotland) Bill. It occurred to one of the committee, that the procedure in Scotch appeals to the House of Lords might be improved, and he wrote to one of the most eminent Parliamentary solicitors for information as to how the expenses of appeals might be reduced. We subjoin the answer which he received, from which it will be seen that this great city of refuge is somewhat costly of attainment, and that the evil is beyond human remedy. This communication raises the question, Whether

it would not be advisable to have a Court of Appeal (like the Exchequer Chamber) in Scotland before going to the House of Lords:—

‘We have nothing to complain of as regards the form of procedure under the Standing Orders. It is extremely simple, and at the same time sufficiently elastic to meet special cases, with little extra cost.

‘If parties conform to the Standing Orders, there are not more than *three* steps in an appeal previous to the hearing, and the House fees would not exceed L.16.

‘Additional costs and additional fees are incurred by petitions for extension of time, and for leave to lodge cases out of time, etc.; but, after all, the average of House fees is under L.25. There is not much room for cutting and carving here; and if there were, you could not, without the consent of the House of Lords, touch these fees, in which a number of officers have a vested interest.

‘I have made up from our own books a statement of the costs of appeals, which I enclose. You will see that counsel’s fees are upwards of one-half of the amount, and House fees (appellant’s) not one-twelfth. The respondent’s House fees are less in reality; but the sums in the statement include the fees of taxation.

‘The main elements of expense in appeals to the House of Lords are counsel’s fees; but so long as the present system of having two Queen’s Counsel in Scotch appeals continues, I don’t see how these fees can be reduced. The London agent has not the choice of counsel in one case out of ten. He gets instructions from the Edinburgh agent to retain two of the leading Q. C.’s; or, at the utmost, the choice left to him is, which couple out of the three or four who are eminent for the time he would recommend.

‘I can’t say this is unwise. The difference of cost between a second senior and a junior would not be above L.25—or say the difference between a brief fee of 20 and 40 or 25 and 50 guineas; the other fees—Bar and Consultation and Retainer—being the same to each. And with two seniors, you not only have the best advice at consultation, but at the hearing either is ready to go on,—a great convenience with scattered courts and over-burdened leaders.

‘Mr Richardson often told me, that in his early London days, and down to the time of Lushington and Campbell, 15 guineas was the usual fee in Scotch appeals, and 20 and 25 guineas were thought handsome fees in heavy cases. Now-a-days, we rarely give less than 40 to any Q. C., and fees range from that to 100 guineas.

'A case really of importance can stand these costs, and after all it is only such cases that should come up. We have many so trifling, and so obviously perverse, that they bring scandal on our Scottish Courts and jurisprudence.'

We do not concur in the last remark of our correspondent. There are, no doubt, many frivolous cases taken to the House of Lords that ought not to be carried there. But consider the aggravation! Look at the practice of the Inner House. How often does it decide cases upon the opening statement of the nervous junior for the reclamer! The case is not heard! The senior, who has been retained at a heavy rate, is not allowed to open his mouth; and the client, the Glasgow agent, the Edinburgh agent, and (in part) the counsel, come out of the Division heated, furious, and determined. The appeal is resolved on within ten minutes after judgment!

It is a great mistake to decide a case on first impressions. Lord Mansfield laid it down long, long ago, that a judge should hear the reasons in support of the view he favours, in order that he might thereby see how weak are the grounds on which his judgment rests. How necessary this is, may be found in the fact, that one of the cases which the First Division disposed of during last year, without hearing other than the counsel for the reclamer, was reversed on appeal. There are other things, therefore, than 'perverseness' that send people to the House of Lords.

This is the note from the books of our London friend:—

NOTE OF LONDON COSTS IN APPEALS FROM THE COURT OF SESSION.

Parties.	No.	Cause in the Paper for hearing, etc.	Agents' Charges, including out-lays (Fees excepted).			Counsels' Fees.			House Fees.			Total.		
			£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
<i>Appellants' costs.*</i>	1	3 days.	112	3	5	209	14	0	24	10	0	346	7	5
	2	3 "	102	12	1	277	8	0	22	8	0	402	8	1
	3	3 "	82	6	4	170	17	0	20	6	0	273	9	4
<i>Respondents' costs.*</i>	4	19 "	243	5	0	587	9	6	32	11	2	863	5	8
	5	3 "	90	2	0	149	17	0	30	0	2	269	19	2
	6	2 "	96	12	6	110	2	6	32	16	2	239	11	2
	7	3 "	88	13	4	161	2	0	28	12	4	278	7	8
	8	1 "	55	9	4	82	13	0	27	13	4	165	15	8
	9	4 "	98	4	3	157	7	0	33	14	10	289	6	1
	10	2 "	71	3	8	126	14	0	27	7	8	225	5	4

* Costs of one side only in all the above cases.

PAMPHLETS ON THE COURT OF SESSION BILL.

Suggestions relative to the Improvement of Court of Session Procedure, derived from the Practice of the Courts of Common Law and Chancery in England. BY JOHN BOYD KINNEAR, Advocate, and of Lincoln's Inn, Barrister-at-Law. Edinburgh: Bell and Bradfute.

Objections submitted to the Court of Session (Scotland) Act, in reference to the provision enforcing Trials by Jury. Edinburgh: T. and T. Clark.

WE have placed these pamphlets together because of their resemblance in tone and in purpose. In both the subject is treated in the serious and dispassionate manner appropriate to the discussion of a question with which neither party predilections nor personal interests ought to interfere. Both recognise the necessity of some reform in the procedure of the Court of Session, and give to the responsible authors of the Court of Session Bill the credit which justly belongs to them, for the many valuable improvements suggested in the Bill; and for dealing boldly with the question of codification. But when they come to criticism, the two reviewers part company. Mr Kinnear, who is a Chancery barrister, is opposed to the extension to Scotland of the system of pleading which is in use in the rival jurisdiction of the Common Law Courts. The anonymous author of the 'Objections,' who we should imagine to be a practitioner in our own Courts, is opposed to jury trial, and therefore regards with an unfriendly eye those provisions of the Court of Session Bill which are calculated to improve and popularize that mode of trial. We shall deal, in the first place, with the suggestions of Mr Kinnear.

In a 'Prefatory Note' Mr Kinnear states his reasons for offering his views on the subject of Scotch procedure, and for withholding his confidence from those embodied in the Court of Session Bill. The first explanation was scarcely necessary, the second is not very convincing. Mr Kinnear affirms—and so far he is on safe ground—that members of the Scotch bar, in availing themselves of suggestions derived from the practice of the English Courts, labour under the disadvantage of being imperfectly acquainted with the details of that practice. But he does not say, either in the prefatory note or in the text, that the want of proficiency in English law has, in this

instance, betrayed the framers of the Bill into practical blunders. So far, this negative result of Mr Kinnear's examination of the Bill is confirmatory of the general opinion, that the Bill is carefully drawn. But the suggestion is, that members of the Scotch profession, by reason of their unfamiliarity with English pleading, are not qualified to judge of its merits as a system. On this assertion we join issue with Mr Kinnear. There is nothing very recondite in the principles according to which issues of fact are raised by plea, replication, and rejoinder, and issues of law by demurrer. It is, at least, 'as easy as algebra.' With all deference to the Chancery Bar, we believe that we have the same means of informing ourselves on the subject of Common Law pleading as they have, and that experience of the system is not necessary to qualify us for forming an opinion on its merits. If it were otherwise, then, however excellent that system might be, it never could extend itself to other countries; for in no other country could we hope to find a body of men who had proved the utility of the system by experience.

In the opening observations of the text of his pamphlet, Mr Kinnear announces the proposition which he undertakes to establish; which is, that the Chancery form of pleading, which he identifies with the Scotch, is preferable to the special pleading of the Common Law Courts. The greater part of the pamphlet, so far as it professes to be critical, is occupied with the illustration and enforcement of this point; and the remainder consists of suggestions for the improvement of Court of Session procedure; all of which, as summarized at pages 22-24, are taken without acknowledgment from the Court of Session Bill itself. We must except the proposition to abolish edictal citations, which, however, would involve further alterations with respect to the finality of decrees in absence, that have not yet been sufficiently considered.

We think that Mr Kinnear makes too much of the supposed resemblance between Court of Session pleadings and Chancery pleadings; and it appears to us that the resemblance is confined to a single element, which is, that in both cases the pleadings are circumstantial. That our readers who have not had occasion to study the system of pleading used in the Court of Chancery may judge for themselves, we shall state what that system is. The plaintiff's only pleading is the 'bill,' which consists of a writ in the same form as the Common Law writ of summons,—an articulate narrative of the grounds of the suit, and a prayer. The defend-

ant's pleading, called 'answers,' consists of an articulate narrative of facts, not, as might be supposed from its title, in the form of answers to the articles of the plaintiff's statement, but a separate narrative, in which the circumstances giving rise to the action may be, and often are, set forth in a different order of arrangement from that followed in the 'bill.' The plaintiff is entitled to file a replication; but that is a mere formal document, like the pursuer's minute of denial in our Courts, where the record is closed on summons and defences. There is, therefore, no provision under this system for making the statements in the bill and answers meet so as to elicit issues; and accordingly issues, where these are requisite, are stated by the Court in a form substantially identical with that of our own interrogatory issues. There is no revisal, but the advantage of revisal is obtained in a more simple form by manuscript amendment of the printed bill and answers.

Now, we are far from considering this form of pleading to be substantially similar to our own, but we do not hesitate to say that it is a great improvement upon the Court of Session system. It is, moreover, identical in principle with our Sheriff Court pleading by summons and minute of defence, only more circumstantial. To the majority of actions in the Court of Session it is very well adapted, and we should cordially welcome its adoption in every class of cases, except those which are designated for jury trial. Its superiority in comparison with our existing form of record is very manifest. In the first place, there is no revisal, but only what is equivalent to 'adjustment' of our papers, which every practitioner knows to be sufficient for all practical purposes. Secondly, there are no separate answers to the statements of the adverse party. The only object to be gained by requiring distinct admissions or denials of adverse statements, is that of bringing the parties to an issue. But, confessedly, that object is not accomplished by the answers under the Scotch system; and for this obvious reason, that the averments which the adverse party is required to admit or deny, are not complete grounds of action, but partial statements, the relevancy of which, as bearing on the ground of action, is open to discussion. As issues of fact cannot be raised by pleadings in the articulate or circumstantial form, we think it better that no separate answers should be given, but that each party should, so far as necessary, incorporate his answers to the other in his own statement. By dispensing with separate answers we get rid of the necessity for revisal,

and in this way effect a saving of time, which may be more advantageously devoted to the adjustment of issues, or the determination of the points to which the proof is to be confined.

We also agree with Mr Kinnear in thinking that great benefit would result from an enactment compelling the judge or the Court to fix the issues in cases where issues are requisite. Our law of process, as at present administered, leaves the Court a mere power of vetoing the drafts of issues which may be successively presented. It is impossible to conceive of anything calling itself judicial procedure more eminently absurd. Obviously, the duty of the Court is to hear what can be said in support of the issues as drafted, to receive the defender's amendments, and finally, to alter the draft in conformity with its own views.

While concurring so far with Mr Kinnear's recommendations, we are very desirous that the system of special or exhaustive pleading should be tried in our Courts as applicable to money actions. Until parties are enabled to go to trial with their whole case, jury trial will never be popular, and a trial upon issues almost always involves the omission of some material part of the case for one of the parties. On the whole, a classification of actions, such as was attempted in the Court of Session Bill in its original form, seems to offer the best prospect of improvement in the practical working of our system.

The anonymous pamphlet published by Messrs Clark contains, on the whole, a very moderate and candid statement of the objections to jury trial. The author is of opinion,—and here we are entirely at one with him,—that in a vast proportion of Court of Session cases the evidence might best be taken by the Lord Ordinary, sitting not as a jury, but as a judge, his interlocutor being subject to review, both on the law and the facts, by the Inner House, whose findings in fact should be final. He approves of the provisions of sec. 138 of the Court of Session Bill, regulating trials before the Lord Ordinary; and, like Mr Kinnear, appears to write under the influence of feelings not unfriendly to the main objects of that measure.

The author of this pamphlet is not prepared to recommend the entire abolition of jury trial, but would maintain it as a mode of ascertaining facts peculiarly adapted to the cognizance of juries. His views on this point are expressed in the quotation with which we conclude this notice :—

'At the same time, jury trial need not be abolished. It may be retained in its entirety; and not only made available whenever parties concur in preferring

that mode of trial, but also for the settlement of cases to which the Court may think it beneficially applicable,—such, for instance, it may be, as actions of damages for defamation and libel, etc. But the special appropriation of actions for jury trial, which the judges consider cannot be beneficially so settled, should be abolished; for, if not, it must certainly, as a learned judge observed, continue “to operate as an absolute denial of justice in a vast proportion of cases.” Jury trial, in any system of Scottish judicature, should be made the exception and not the rule. As was proposed on its first introduction, it should be left optional to the parties, or discretionary to the Court.’

Correspondence.

THE SHERIFF COURTS.

(To the Editor of the Journal of Jurisprudence.)

SIR,—From the concluding sentence of the second of your two recent articles on the Sheriff Courts, I perceive that you are about to leave the subject, without touching the questions raised by the Sheriffs-substitute, in order to discuss a stock question of no particular interest at the present moment.

I may remind you that the questions raised by the Sheriffs-substitute are two :—

First, Whether the present practical exclusion of the Sheriffs-substitute from all promotion is advisable? And,

Second, Whether, having regard to their duties, and to the scale on which somewhat similar duties are remunerated in England, their salaries are adequate?

I submit that these questions, and more particularly the former of them, are questions of public interest, deserving and capable of discussion. apart from questions of legislative change on the constitution of the Sheriff Courts.

The question raised by you and represented by you to be the sole one connected with the Sheriff Courts at present worthy of public discussion, I do not dispute to be important; but, with deference, I submit that you have raised it at an unsuitable time, with the effect—doubtless unintended—of doing your best to withdraw the attention of the public from what the Sheriffs-substitute really claim. A very few words will be sufficient to show that the system of having both Sheriffs and Sheriffs-substitute, affects neither the claim of the substitutes to be occasionally considered in the matter of promotion, nor their claim for more adequate remuneration.

I should have thought that it could hardly have escaped observation, that one ground of complaint, stated in the recent memorial of the Sheriffs-substitute, was, that they were never promoted to the office of Sheriff. If, therefore, the office of Sheriff were to be abolished, its simple effect would be to throw additional difficulties in the way of granting the first claim of the Sheriffs-substitute, by cutting off one avenue to promotion.

With regard to the second claim, the only relevant answer to a claim for additional remuneration would be, that the Sheriffs-substitute were already paid according to their work and their position. Now, were

the office of Sheriff to be abolished to-morrow, neither the one nor the other of these would be materially altered.

As you admit, the usual and important duty performed by the Sheriff is to judge in appeals. The work which he does as a judge of the first instance—which is the only work that he saves to the Substitutes—is confessedly small in amount. He holds a few small debt courts, one or two jury trials, and perhaps some registration courts; and there his duties as a judge of the first instance usually end. I need hardly say that if the Sheriffs-substitute were to claim additional remuneration on the ground of having to perform the additional work which that would represent, their prospects of success would not be great.

As regards the position of the Sheriff-substitute, the question you raise affects it only remotely, and more in appearance than in substance. At present the Sheriff-substitute is judge ordinary in matters criminal and civil, in his county; and if there were no Sheriffs he would just remain what he is now, judge ordinary of the county—neither more nor less. The forum of the appeals from his decisions would be transferred from some particular county town to the Parliament House, certain country agents would lose the profits of some appeals, and certain counsel gain the profits of some advocations, but the Sheriff-substitute would remain precisely where he was—a simple judge of the first instance, responsible in every respect to superior tribunals. Indeed, almost the most important effect that the abolition of the present office of Sheriff would have upon the Sheriff-substitute would be, that his title would be somewhat diminished in length, and that he would thus get an accession of dignity somewhat similar to that which the Sheriffs experienced when they got rid of what you seem to consider the obnoxious epithet of Depute.

Should you think it worth while to discuss the claims of the Sheriffs-substitute upon their own merits, and then arrive at a conclusion unfavourable to them, I may request leave to be heard in reply. Meanwhile, I submit to you, with some confidence, that it is no answer to the claims of one set of officials for occasional promotion and more adequate remuneration, to deliver a lecture upon the merits of another set of officials, who do get occasional promotion, and who, for aught you have said to the contrary, may receive adequate remuneration.—I am, etc.,

A SHERIFF-SUBSTITUTE.

P.S.—I have not added my name to this letter, as I think questions like the present are better discussed apart from personal considerations; but if any one should think otherwise, and inquire who the writer may be, I make you welcome to inform him.

[Our correspondent will perceive, from the leading article of our present impression, that the topics to which he adverts have not been overlooked by us. We have no desire to approach the subject in any other spirit than that of calm discussion. The question of the continuance of the double Sheriffship has been forced upon us by the Sheriffs-substitute, or those who profess to speak in the name of their body; and it is not our fault if the discussion has had the effect of withdrawing attention from the question of the claims of these gentlemen to more liberal remuneration.—*Ed. J. J.*]

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

JENKINS AND OTHERS v. GRIGOR AND ROBERTSON.—*Jan. 5.*

Process—Contingency.

This is an action of declarator of right of way along the banks of the Lossie, near Elgin. A case in which the same question was raised was tried about a year and a half ago before the Lord Justice-Clerk and a jury. The jury returned a verdict for the pursuers, but the Second Division set aside the verdict as contrary to evidence, and granted a new trial. There was no new trial, and the case was taken out of Court by decree of absolvitor in favour of the defenders. The defenders in this case have pleaded *res judicata*, and the Lord Ordinary sustained that plea. A reclaiming note against that interlocutor was in the Single Bills of this Division to-day, when the Lord Advocate, for the defenders, moved that the case should be remitted to the Second Division, as the former case, which was precisely similar to the present, depended before that Court.

The Court held they had no power to grant this motion, there being no cause *now* depending in the other Division between which and the present there could be said to be any contingency.

HENDERSON v. MUNRO.—*Jan. 5.*

Process—Jury Trial.

This is an action for the recovery of business accounts incurred to the pursuer as law-agent, factor, and commissioner for the defender. The defender, whilst admitting the employment of the pursuer generally by him, objected to certain branches of the accounts, and entirely disputed any liability for them. The grounds of these objections were generally to the effect that the pursuer, in performing the pieces of business objected to, had acted in excess of his authority—in contravention of the terms of an agreement to which he had become a party on behalf of the defender—and that the defender's consent to the business being done was induced by false representations by the pursuer. At the debate in the Outer House a question arose as to the mode of proof, the defender contending that the case should be sent to a jury for trial; whilst the pursuer, on the other hand, maintained that the points at issue between the parties being chiefly questions of law, not of fact, any proof which might be necessary should be taken by commission, and not be led before a jury. The Lord Ordinary (Jerviswoode) reported the case to the Court, under the 49th section of the Court of Session Act, 1850, with a note directing the attention of the Court to the nature of the statements on record, and expressing the opinion that the case was not one which could in whole or in part be expediently submitted to a jury. After hearing counsel on 10th December, the Court allowed the defender, before answer, to lodge a draft

of the issues which he proposed should be sent for trial, and the case with these proposed issues came on for discussion to-day. The Court, after hearing counsel, held that, looking to the mixed nature of the case, the intermixture of questions of law and fact, and the preponderance of the former over the latter, the case was not adapted for jury trial; and their Lordships therefore granted the pursuer's motion for a proof by commission to both parties. The pursuer having moved for expenses from the date of the Lord Ordinary's interlocutor reporting the case, the defender contended that expenses should be reserved to await the final issue of the case, as the Lord Ordinary had no power, under the statute, to appoint the proof to be taken by commission except with his (the defender's) consent, and he was entitled to withhold his consent, and to have their Lordships' opinion as to the mode of proof, without paying any expenses to the other side.

The Court awarded expenses to the pursuer from the date of the Lord Ordinary's interlocutor, holding that, without fixing any general rule, in this case expenses were clearly due, the Lord Ordinary having expressed his opinion that the case was not one for jury trial, and that view, which was now given effect to by the Court, not having been acquiesced in by the defender.

MACKINTOSH v. SMITH AND LOWE.—Jan. 7.

Reparation—Illegal Detention.

This is an action of damages for alleged wrongous detention in Saughton Hall Asylum. Some time ago the pursuer raised against several parties, including the present defenders, who are the proprietors or keepers of the asylum, an action of declarator of sanity, concluding to have it found that, in June and July 1852, and down to the date of the action in April 1861, the pursuer was *compos mentis*. There was no intimation in this summons that it was in any way to be made the groundwork of a claim of damages, and no one having appeared to maintain a defence to the action, a decree in absence was taken. The pursuer now proposes to take this decree as fixing his sanity at the time in question, and so to set it forth in a preamble to the issue, and simply to ask the question whether the defenders 'did detain' him to his loss and damage.

To-day the Court disallowed the proposed preamble to the issue, and held that the issue to be granted must be whether the pursuer was detained in the asylum by the defenders *wrongously and illegally*. Their Lordships held the decree of declarator of sanity obtained in absence could not be recognised at the present stage, whatever effect might be given to it at the trial.

ROGERS v. DICK.—Jan. 8.

Defamation—Expenses.

This was an action of damages for slander at the instance of the Rev. Charles Rogers, LL.D., formerly chaplain at Stirling Castle, against John Dick of Craigengelt, residing in Stirling, in which damages were laid at L.5000. Last summer the case was tried before the Lord President and a jury, on four issues, substantially to the following effect:—

1. Whether the defender, for the purpose of getting the pursuer dismissed from his situation as chaplain at Stirling Castle, wrote a par-

ticular letter to the Principal Secretary of State for War ; and whether in that letter the defender falsely, calumniously, maliciously, and without probable cause, represented the pursuer as having neglected his clerical duties for pursuits of a secular character.

'2. Whether at a court of inquiry held at Stirling, the defender's son, by his father's instructions, made a false and calumnious statement to the effect that the pursuer had appended to a prospectus he was issuing a list of names of persons as members thereof without their authority, under the pretext of collecting money for the improvement of the town of Stirling, but for the purpose of transferring the same into his own pocket.

'3. Whether the defender, at the same court of inquiry, had falsely, calumniously, maliciously, and without probable cause, stated that the pursuer had appropriated to his own use part of the Wallace Monument funds ; and

'4. Whether the defender, at the same time and place, had stated falsely, calumniously, maliciously, and without probable cause, that the pursuer had, during the night, knocked down certain churchyard walls, thereby involving the burgh of Stirling in a lawsuit, which cost the burgh L.400.'

The jury returned a verdict for the pursuer on the first issue, assessing the damage at 1s., and found for the defender on the other three.

To-day the pursuer moved to have the verdict applied, and for expenses. The defender moved for decree of absolvitor, and that no expenses be found due to either party. The Court gave the pursuer expenses, but subject to modification.

The Lord President observed that he had no doubt as to the general rule, that, in an action brought for the vindication of character against a slander, the pursuer, on getting a verdict with merely nominal damages, was entitled to full expenses. In fixing the amount of the modification there should be kept in view not only that the expense incurred by the pursuer, applicable to the three last issues, had been incurred in regard to a part of the case on which he had been unsuccessful, but that the defender had been put to expense on this part of the case, in which he had been successful.

Lords Curriehill and Deas concurred, the latter observing that, if the question now raised had been before himself alone, he would have found expenses due to neither party ; but he yielded his opinion to that of the Lord President, who, from having tried the case, was better acquainted with its details.

Adv., CAMPBELL v. M'DOUGALL OR M'GILLIVRAY.—Jan. 13.

Sheriff Court Process—Aliment.

This was an advocacy from the Sheriff Court of Inverary, brought under the following circumstances :—In 1857 the respondent, then an unmarried woman, presented a petition to the Justices of the Peace for the county of Argyle, praying the Justices to decern against William Campbell, as the father of her illegitimate child, in certain sums of money. Campbell obeyed the citation to the Justice of Peace Court, and admitted the paternity. The Justices accordingly decerned in terms of the prayer of the petition, and under this decree Campbell paid for some years ; but finding, as he alleges, that the child was being neglected, and the money

misappropriated, he refused to make further payment. Upon this, M'Dougall, who had married in the interval, raised an action in the Sheriff Court, concluding, as before, for the aliment of the child from its birth till it was ten years of age. In the conclusions of the summons she allowed a deduction in respect of the sums paid by the defender; and in the condescendence she restricted the libel to a claim of L.4 annually. The defender met the action by the plea of *res judicata* in respect of the decree before the Justices. He also disputed the amount of aliment for which credit was given, alleging that it had been paid up to March 1861, while the pursuer said March 1860. The Sheriff-substitute (Graham) sustained the plea of *res judicata* stated for the defender, and dismissed the action. The Sheriff (Cleghorn) recalled the judgment, repelled the plea of *res judicata*, and found the defender liable in terms of the conclusions of the summons, but qualified his judgment in the following terms:—'But, in respect the defender states on record that a larger sum was paid to account than has been given credit for in the summons, appoints the case to be enrolled, that the defender may state whether he has any receipts or other evidence to adduce in order to substantiate this averment, and decerns.' Subsequent to this interlocutor, and on 18th September 1863, a joint minute for the parties, in the following terms, was put into process:—'The parties, in order to save further litigation and expense, in respect (besides the question of expenses) the only point now undecided relates to the sum of L.4, being the difference between the alleged payments made to account of aliment, and the sums the defender alleges to have been paid, hereby consent that this difference be halved, and that the aliment and inlying expenses be held to have been paid up to 24th September 1860; and they further consent to authority being interponed to this minute.' In respect of this admission, the Sheriff, on 30th September, found the defender liable to pay from 24th September 1860 onwards until the child should attain the age of ten years. The defender thereupon advocated, and additional pleas were lodged for both parties. In their additional pleas the pursuers (respondents) did not found on the minute in question as barring the defenders (advocators) from taking further proceedings.

To-day the Court refused the advocacy, the Lord President remarking that he thought the pursuer was entitled to go to the Sheriff if the defender refused to pay under the Justice of Peace decree, and that, having restricted the libel, the defender was bound to pay.

Pet., MRS MARY CRUICKSHANK OR TURNBULL.—Jan. 14.

Husband and Wife—Protection Order—Desertion.

This is a petition, under the 'Conjugal Rights (Scotland) Act,' by a wife for protection of her property against her husband (by whom, she alleges, she has been deserted), and against her husband's creditors. By the statute referred to, sec. 1, a wife, deserted by her husband, may, at any time after such desertion, 'apply by petition to any Lord Ordinary of the Court of Session, or, in time of vacation, to the Lord Ordinary on the Bills, for an order to protect property which she has acquired, or may acquire, by her own industry, after such desertion, and property which she has succeeded to, or may succeed to, or acquire right to, after such desertion, against her husband, or his creditors, or any person claim-

ing in and through his right ;' and then it is enacted, in the same section of the statute, that after the petition has been intimated on the walls and Minute-Book, the Lord Ordinary shall require evidence of such desertion. and on being satisfied thereof, and that the same was without reasonable cause, shall pronounce an interlocutor giving to the wife protection of her property, as aforesaid, against the husband, and all creditors or persons claiming under or through him. The consequences resulting from an order for protection, are, (sec. 3) that no action of adherence shall be competent while the order subsists ; (sec. 4) that after the interlocutor of protection is pronounced, the property of the wife shall belong to her as if she were unmarried ; and (sec. 5) that an order of protection shall have the effect of a decree of separation. In the present case, evidence was adduced by the petitioner in support of the alleged desertion on which her application was founded, consisting of her own and the parole testimony of some other persons, beside four letters which she had received from her husband since his alleged desertion of her in June last. From the proof it appeared that the petitioner was the wife of Wm. Turnbull, by whom she said she had been deserted ; and Wm. Turnbull left home in June last, saying that he was going to the south to buy cattle, but in reality left the country, and from anything that appeared to the contrary was still abroad. Soon after he left he was sequestered, his liabilities amounting to upwards of L.5000. In particular, from the four letters which the petitioner had received from her husband since he left her, which were dated from America, it appeared, (1) That the object of his going away was to be out of the way of his creditors ; (2) that there was no quarrel or disagreement between the petitioner and her husband, but, on the contrary, that they were on the best and most affectionate terms ; (3) that, in place of the petitioner's husband having any desire to avoid living with her, his letters evinced not only the deepest regret on his part that he should have been obliged to go abroad, but also a strong hope that he might be enabled ultimately—in about two years, he said, in one of his letters—to rejoin his wife and family ; and (4) that he was to keep his wife informed of his motions, and, in particular, that he was to write her whenever he ' gets settled.'

The Lord Ordinary (Ormidale) dismissed the petition, *inter alia*, on the following grounds stated in his note :—' The Lord Ordinary has been unable to satisfy himself that the petitioner has been deserted, that is to say, forsaken and abandoned by her husband. It is not enough for her to show that her husband does not now live with her, or that he has gone abroad for any cause, and is now temporarily resident in another country. A wife must, in the general case, follow and submit to the fortunes of her husband ; and if circumstances require that she should, for a time, live with him abroad, this can be no reason for the interposition of the Court. and giving her what is to have the effect of a decree of separation. For anything that appears to the contrary, the petitioner's husband will be ready to receive her so soon as he " gets settled," in order that they may live together abroad, till he finds himself enabled to return to this country. Nor would it follow, in the Lord Ordinary's opinion, that the petitioner could be held as deserted by her husband in the sense of the statute, even although his circumstances rendered it necessary for him to remain for some time abroad separate from her, the more especially where, as it

rather appears, she has means of support already secured to her independently of her husband.'

The petitioner having reclaimed, the case was advised to-day, when the Court recalled the Lord Ordinary's interlocutor, remitting to his Lordship to grant the prayer of the petition.

The Lord President, after referring to the importance of the question raised, as affecting the rights of husband and wife, said, the questions before the Court were, whether in the present case the petitioner had been *deserted* by her husband, in the sense of that term in the Conjugal Rights (Scotland) Act; and if so, whether the desertion had been 'without reasonable cause.' He thought it quite clear the statute referred to did not require the same kind of desertion as the statute of 1573, making desertion a ground for suing a divorce. The term fell to be construed with reference to the intendment of the particular enactment in which it occurred; and looking to the intendment of the statute in question, he thought a *prima facie* case of desertion had been made out by the petitioner. Her husband had left her without notice, and, indeed, under false pretences. He was implementing none of the duties or obligations of a husband. He had left the country, and there was little or no prospect of his return, and he had left his wife unprovided for. He (the Lord President) thought the petitioner had made out a *prima facie* case of desertion. The only other question was, whether that desertion was without reasonable cause. The cause of the desertion appeared to be his liabilities to his creditors; but it was no reasonable cause for deserting his wife that he fled from his creditors. An honest bankrupt was bound to stay and face his creditors, and give them every explanation as to his affairs. His Lordship, therefore, thought desertion without reasonable cause had been proved in the present case, and that the Lord Ordinary's interlocutor ought to be recalled. In coming to this conclusion, he had been considerably influenced by the consideration that the order of protection, though now granted, might at any time be recalled on cause shown by the husband or his creditors.

Lords Curriehill and Deas concurred, and on the grounds stated by the Lord President. Mere absence by the husband, they observed, would not be sufficient.

M'DONALD v. DOBBIE.—Jan. 14.

Reduction—Public Houses Acts.

This was an action of reduction of a conviction obtained at the instance of Dobbie, superintendent of police, Renfrew, against M'Donald, a grocer and spirit-dealer there. M'Donald was charged with an offence under the Public Houses Acts Amendment (Scotland) Act, 1862, and fined in L.5 of penalty, and also found liable in L.2, 4s. of expenses; and in default of immediate payment, the magistrate (Baillie Henderson, Renfrew) adjudged M'Donald to be committed to the prison of Paisley for the period of one month. The pursuer, M'Donald, maintained in the present action that the proceedings against him were groundless, harsh, and oppressive, and that they were besides irregular and illegal, and contrary to the provisions of the statute under which they professed to be taken. The objection mainly relied on by the pursuer, and which has been given effect to by the Court, was that the magistrate had no power to grant warrant

for immediate imprisonment on failure to pay the penalty, and that fourteen days ought to have been allowed him for that purpose. The defender stated a preliminary defence to the action, to the effect that reduction and all forms of review of the conviction or sentence and proceedings complained of were expressly excluded by the terms of the Public Houses Amendment (Scotland) Act, and that the Court of Session had no jurisdiction to entertain the action. The Lord Ordinary (Ormidale) repelled this defence, and found the defender liable in expenses. His Lordship held that the clauses in the Amendment Act providing for appeal to the Circuit or High Court of Justiciary, and excluding all review by reduction or otherwise, was 'not sufficient to exclude a party, aggrieved by so gross an excess of power and violation of the statute, as have occurred here, from the ordinary mode of redress as adopted by the pursuer of this action.'

The defender having reclaimed, the Court unanimously adhered to the Lord Ordinary's interlocutor.

MUIRHEAD v. THE GLASGOW HIGHLAND SOCIETY.—Jan. 15.

Servitude—Right to Build.

The pursuer and the defenders are respectively proprietors of subjects fronting to Argyle Street, Glasgow. Both properties were derived from the same author—M'Dowall of Castle Semple. The one came to belong to the Highland Society of Glasgow, the defenders, the other to the Union Bank of Scotland. In 1856, both proprietors had, under their titles, certain rights in the mutual or mean wall between their properties, and the bank had a servitude over fifty feet of back ground belonging to the Society. In that year the defenders, at great expense, erected a solid block of building on the back ground. In 1857, the pursuer purchased from the Union Bank their property. He had been previously tenant of the subjects, and therefore knew prior to, and at the time of the purchase, that the erection had been made on the defenders' back ground. In the following year the operations of the defenders were challenged for the first time by the pursuer, who, in the present action, seeks to have the rights under his titles declared as they were adjusted in 1806 and 1810, and to have the defenders' buildings removed, in so far as they are inconsistent with these rights.

The Lord Ordinary (Barcaple) assolizied the defenders, and to-day the Court unanimously adhered, substantially on the following grounds as stated by Lord Deas: First, as to the servitude,—if one proprietor stands by and sees another performing, at great expense, operations at variance with a servitude right, and says nothing, that silence amounts to acquiescence, which bars him from afterwards pleading his servitude. The Union Bank, therefore, could not have maintained this action. Second, there is a sufficient answer to the action in the warrant of the Dean of Guild, under which the buildings on the back ground of the defenders' property were erected. The application to the Dean of Guild was directed against and served upon the Union Bank, and the petition was accompanied by plans of the proposed alterations. This was judicial intimation to the Union Bank. One of the objects of the application to the Dean of Guild was to afford the Union Bank the opportunity of op-

posing a warrant for the proposed erections being granted; and if the bank did not oppose the warrant being granted, but allowed the buildings to go on, they could not interfere now. Third, There is a sufficient answer to the action in the fact that there is proof of actual written consent by the bank to the erection being made.

Pat., W. R. YOUNG AND OTHERS (SIDDONS' CURATORS).—Jan. 22.

Process—Petition.

This is a petition for delivery of a bond of caution, for curators nominated by a minor in an action of choosing curators. That action was raised, and the act of curatory was extracted in the year 1855. The ward having attained majority in December last, the curators have handed over to her the funds and estates under their management, and have been discharged. The petition was originally presented to the Junior Lord Ordinary, under the Act 20 and 21 Vict., c. 56; but his Lordship had doubts as to whether this was not a petition 'incident to a depending cause,' and only competent in the Inner House. After hearing counsel, his Lordship adjourned the case, to give an opportunity for ascertaining the previous practice in regard to petitions of this nature. It was found that the practice had not been uniform, and accordingly the Lord Ordinary refused to entertain the petition. It was to-day presented in the First Division, when their Lordships, without discussion, appointed intimation and service.

SECOND DIVISION.

J. AND W. CRUICKSHANKS (DUTHIE'S TRUSTEES) v. DUTHIE.—Jan. 6.

Process—Reclaiming Note.

This was an action of multiplepounding brought by the trustees of the late John Duthie, fisherman, Rosehearty, as real raisers, for the purpose of having the trust estate divided among the beneficiaries. The value of the trust estate was not stated in the summons; and on 5th June last the Lord Ordinary appointed the pursuers to lodge a condescendence of the fund *in medio* within eight days. The pursuers having failed to obtemper this order, the Lord Ordinary, on 16th July, pronounced an interlocutor, allowing a condescendence of the fund *in medio* to be put in by the daughters of the truster, who had been called as defenders in the action. This was accordingly done, the amount brought out by the defenders, as the value of the trust estate, being L.248, 10s. Thereafter the Lord Ordinary pronounced the following interlocutors:—'25th November 1863.—Appoints the pursuers and real raisers, the holders of the fund *in medio*, to consign the amount thereof, as the same is brought out in the condescendence of the said fund, in the Royal Bank of Scotland, on a deposit-receipt taken payable to the party and parties who shall ultimately be preferred thereto, and that within eight days.' '9th December 1863.—In respect the pursuers and real raisers have failed to make consignment in terms of the interlocutor of 25th November last, allows decree of consignment to go out, and be extracted in terms of said interlocutor in name of Elizabeth Duthie or Dunbar, called as a defender, for behoof of all concerned, and decerns.' The pursuers lodged a reclaiming

note on the box-day (31st December 1863), of which the following was the prayer:—‘May it therefore please your Lordships to recall and alter the said interlocutors of 16th July 1863, 25th November 1863, and 9th December 1863, and to allow the reclaimers, or to remit to the Lord Ordinary to allow the reclaimers, to lodge a condescendence of the fund *in medio*, within a short specified time, and upon payment of such expenses as may seem reasonable; or otherwise to recall and alter the two last-mentioned interlocutors, and to allow the reclaimers to give in answers to the condescendence of the fund *in medio*, lodged in terms of the interlocutor of 16th July 1863; and further, to remit the cause to the Lord Ordinary to prepare and proceed therein as accords, or to do otherwise in the premises as to your Lordships shall seem proper.’ The defenders objected to the competency of the reclaiming note, on the ground that the interlocutors were final before the reclaiming note was presented.

The Court were of opinion that the interlocutors of 16th July and 25th November 1863 were final before the reclaiming note was presented, and therefore that *quoad* them it was incompetent. In regard to the interlocutor of the 9th December 1863, their Lordships held that, inasmuch as it ordered consignment of the fund *in medio*, it was an interlocutor disposing in part of the merits of the case, and therefore could competently be reclaimed against at the box-day, twenty-one days not having elapsed from its date at the rising of the Court.

M’KEEN v. ADAIR AND OTHERS (KEVAN’S TRUSTEES).—Jan. 8.

Loan—Evidence.

The pursuer alleged that in May 1862 he was asked by Mrs Kevan, to whom he was then engaged to be married, in a letter which he had lost, for a loan of L.100, and that on the 8th May he drew L.100 from his bank account in Oban, and transmitted it to Mrs Kevan at Stranraer. She, on 10th May, wrote the pursuer:—‘Yours I have just received, with the enclosed L.100, which I shall acknowledge in another form at your convenience. I am sorry I have given you so much trouble, but it will be all right yet.—Yours, etc., ISABELLA.’ And on 14th May she again wrote to the pursuer, explaining what she had done with the money, and adding—‘I just send you this to let you know what I did with the money. It was truly kind of you; and in the plainest terms I thank you from my very heart till I see you, and we can settle about it.’ Mrs Kevan died in July 1862, and was never married to the pursuer. She left a deed of settlement, in which the defenders were appointed her trustees. The pursuer having applied to them for payment of the loan, the defenders refused to pay, and the pursuer then raised the action against them. The defence stated was that no money had ever been lent by the pursuer, but that the money which was sent to Mrs Kevan had been previously deposited by her in the pursuer’s hands. The receipt of the money and the genuineness of Mrs Kevan’s letters were admitted, and both parties renounced probation.

The pursuer maintained that an acknowledgment of the receipt of money imported that the person receiving it received it as a loan under an obligation to repay it with interest; that this was a presumption of law which must be given effect to in this case, because the defenders had made no attempt to rebut it by proving the defence which they had stated.

Lord Ormidale held that the presumption of law did not apply to the circumstances of this case, chiefly because the pursuer had not produced the letter of Mrs Kevan, in which it was said she had asked for the loan. His Lordship held that it would be dangerous to give effect to Mrs Kevan's acknowledgment without production of that letter, and that, as its non-production was attributable to the fault of the pursuer, in whose possession it fell to be, he must bear the consequences of its loss.

The pursuer having reclaimed, the case was debated before the Christmas recess, when the Court took time to consider its judgment. To-day the judges, without adopting all the observations of the Lord Ordinary, adhered to his interlocutor.

GILMOUR OR DUNLOP AND OTHERS v. GILMOUR.—Jan. 14.

Writ—Revocation.

In June 1844, Mrs Jack and Mrs Gilmour, believing themselves to be *pro indiviso* proprietors (to the extent of one-half each) of a tenement in the High Street of Burntisland, executed a conveyance, whereby, in consideration of a payment of L.25 by Mrs Gilmour to Mrs Jack, they assigned the said tenement to Mrs Gilmour, whom failing, to her eldest son, Andrew Gilmour (the defender), and her other children (the pursuers). The conveyance contained the usual clause, 'with all right, title, and interest, claim of right, property, and possession, etc.' It also contained a clause of absolute warrandice. Mr Gilmour died in 1848, and by that time it came to be known that Mrs Jack had really been entitled to two-thirds instead of one-half of the tenement in question. The defender, Andrew Gilmour, the heir-at-law, being advised that the title which had been made up in his mother's favour was null and void, then obtained from Mrs Jack a conveyance *ex facie* gratuitous of said two-thirds in his own favour. He also entered into possession of the subjects, which he still maintains. The present action has been raised for the purpose of setting aside the second conveyance by Mrs Jack, and calling on Andrew Gilmour to count and reckon for the rents of the tenement since 1848. The defender maintains that the pursuers have no title to sue. The Lord Ordinary (Ormidale), without deciding the point, appointed issues to be given in. The defender reclaimed.

The Court were of opinion that the plea of want of title should be repelled, and gave judgment accordingly.

THE NORTH BRITISH RAILWAY COMPANY v. A. C. RENTON.—Jan. 15.

Entail—Compensation Money—Arbitration.

The present action has been raised for the purpose of recovering from the defender certain sums alleged to be due by him as heir of entail in the entailed estate of Lamberton, under decrees-arbitral pronounced by Mr Craige Halkett, with reference to land taken from that estate, and injury done to it in the formation of the North British Railway. The substance of the case is, that these decrees took the heir in possession (at the time Mr John Campbell Renton, the elder brother of the defender) bound to pay certain annual sums to the railway company, in respect of the tenants' damages being so arranged as to enable the heir in possession to draw the full amount of the rents, without any deduction on account of the ground taken away. The pursuers allege that, since his succession to the estate,

the defender has taken full benefit by these decrees-arbitral, by drawing the undiminished rents, and they contend that he is liable to fulfil to them the condition on which alone this benefit was bestowed. The defender objects that the decrees-arbitral, on which the pursuers found, are null under the railway statutes, and he asked that a judgment should be pronounced, throwing the case at once out of Court on this ground. The following issue was proposed by the pursuers for the trial of the case:— ‘Whether the defender, since his succession to the entailed estate of Lamberton in the year 1856, and during the period from 1856 to 1861, both exclusive, or any part thereof, took and received benefit from two sums of L.6724, 17s. 10d. and L.1178, 1s. 2d. consigned by the pursuers in respect of land taken by them from said estate, and injury done thereto, in terms of the decrees-arbitral, interim and final, of which No. 6 of process is an extract; and also, during said period, drew the rents payable by the tenant of the lands of Lamberton, and by the tenant of the salmon-fishing mentioned in said decrees-arbitral, without any diminution or deduction in respect of said land taken or injury done; and whether, in respect thereof, the defender is resting-owing to the pursuers the sum of L.687, 3s. as the amount of which he is bound to relieve the pursuers under the said decrees-arbitral, or any part thereof, with interest at the rate of five per cent. per annum from 1st December 1860?’ The Lord Ordinary (Kinloch), without pronouncing any judgment on the pleas of parties, reported the case to the Court.

The Court gave effect to the contention of the defender, and by a unanimous judgment assoilzied him from the conclusions of the action.

M.P., DONALDSON'S TRUSTEES v. MACDOUGALL AND OTHERS.—Jan. 15.
Trust—Vesting—Construction.

By his trust-disposition and settlement, *mortis causa*, the late James Donaldson conferred a liferent of his whole fortune on his surviving wife, and directed his trustees to pay or convey the fee, ‘after the death of the last liver of me and my said wife,’ to five persons specially named, two of them grandnephews and three grandnieces of the testator. He declared, at the same time, ‘that if any of said residuary legatees should die without leaving lawful issue, before his or her share vest in the party or parties so deceasing, the same shall belong to, and be divided equally, or share and share alike, among the survivors of my said grandnephews and grandnieces equally.’ By a codicil to this deed, the testator appointed another grandnephew, Thomas Young, to be a residuary legatee with the others, thereby increasing the number of residuary legatees to six, three grandnephews, Lieutenant, now Lieut.-Colonel, Macdougall, William Macdougall, and Thomas Young; and three grandnieces, Mrs Thomson, Mrs Richardson, and Mrs Cuthbertson. By an after codicil (the third), the testator declared that he ‘revoked, altered, and qualified’ his deed of settlement and previous codicil, ‘in so far only as these writings, or any of them, authorize and appoint the distribution or payment of certain shares of the fee, or principal sums of the free residue of my means and estate, or proceeds thereof, to be accounted for, and paid to all or any of my three grandnieces; it being my wish and intention to restrict the provisions or bequests in favour of such of them as shall decess without issue to a liferent.’ And he proceeds thus:—‘And therefore hereby authorize,

will, and appoint my said trustees and executors, and survivors or survivor of them, to pay the share or shares bequeathed to my said grandnieces in or by the foresaid deed of settlement, to them and their respective husbands only in liferent, for their, her, or his liferent use alienarly, and the fee of such shares to the lawful issue of my said grandnieces equally; whom failing, to the survivors of them, and my grandnephews, also named in the foregoing settlement or codicils, equally, in liferent, and their issue, also equally, in fee, after the death of the longest liver of me and my wife.' Mrs Donaldson, the liferentrix, survived the testator a good many years. In the interval between her husband's death and her own, three of the residuary legatees had died, William Macdougall, Thomas Young, and Mrs Cuthbertson. Of these, Thomas Young left a son, John Lawford Young. The other two died without issue. Various questions arose on Mrs Donaldson's death in regard to the construction of this deed and codicils. The first brought to judicial trial regarded the right to the shares of William Macdougall and Thomas Young. In a process of multiplepounding brought with reference to these two shares, it was held by a majority of this Court that the right vested a *morte testatoris*, and therefore had passed to the representatives of these legatees by law or by testament. The House of Lords reversed this judgment, and found that the date of vesting was the death of the liferentrix. Applying this principle, they awarded the share of Thomas Young to his son, John Lawford Young, as conditional institute in room of his father, either under the deed, or by application of the maxim *si sine liberis*. The share of William Macdougall they held equally divisible amongst the three surviving legatees, Colonel Macdougall, Mrs Thomson, and Mrs Richardson. They refused to allow any part of this share to John Lawford Young, considering him only entitled to the one-sixth which belonged to his father in his proper right—not to a devolved share, such as William Macdougall's was, which the settlement expressly conferred on the 'survivors of my said grandnephews and grandnieces,' a character not possessed either by Thomas Young or his son. The present multiplepounding has been brought with reference to the share of Mrs Cuthbertson, who also predeceased the liferentrix, and without leaving issue. The question as to this share is so far differently situated from those arising in the former case, that Mrs Cuthbertson being a grandniece, the last codicil comes into play, and introduces provisions inapplicable to the case of grandnephews. Had the codicil in question not been executed, Mrs Cuthbertson's share must (apart from a question raised by her surviving husband) have been disposed of exactly as the share of William Macdougall, that is, must have gone in fee to the three surviving residuary legatees. The following claims are made in the multiplepounding:—1. Mr Allan Cuthbertson, the surviving husband of Mrs Cuthbertson, claims a liferent of the one-sixth share destined for that lady, by virtue of the instructions in the codicil, 'to pay the share or shares bequeathed to my said grandnieces, in or by the foresaid deed of settlement, to them and their respective husbands, only in liferent, for their, her, or his liferent use alienarly, and the fee of such shares to the lawful issue of my said grandnieces equally.' 2. Another claim against the fund *in medio* is at the instance of John Lawford Young, who claims to be preferred 'to the fee of one-half of the fund *in medio*, subject to such liferent interests as may be found to affect the same.'

3. There remain the claims separately urged for Colonel Macdougall and his children. The children of Colonel Macdougall 'claim to be found entitled to the fee of the whole fund *in medio*, subject to the liferents thereof, as provided by the said codicil of 1844.' They say that this follows from the provision in the codicil, because—1st, The one-third share of this devolved share is given to their father in liferent and themselves in fee, in express terms; 2d, With regard to the remaining two-thirds, which are given to Mrs Thomson and Mrs Richardson in liferent, and their issue in fee, the liferent only takes effect in respect of Mrs Thomson and Mrs Richardson having no children, in which case Colonel Macdougall's children say that they themselves take the fee, as being the only issue of all the surviving grandnephews and grandnieces. Colonel Macdougall claims to be preferred on the fund *in medio*, 'for the fee of one-third thereof, and in the event of either or both of the testator's surviving grandnieces predeceasing the claimant without lawful issue, a liferent of the share or shares respectively liferented by them, along with such other grandniece, if any, as may be then surviving?'

The Lord Ordinary (Kinloch) repelled the first two claims, but did not finally dispose of the third claim. This judgment having been reclaimed against, counsel were heard at great length for the several claimants. To-day the case was advised.

The Court pronounced the following interlocutor, recalling the Lord Ordinary's interlocutor, and finding 'that the fund *in medio* consists of one-sixth part of the residue of the trust estate of the deceased James Donaldson, appointed by the third codicil appended to his trust settlement to be paid to Mrs Eliza Cuthbertson, and her husband in liferent, and to her issue in fee; find that Mrs Eliza Cuthbertson having predeceased the testator's widow, leaving no issue, but survived by her husband, the claimant Allan Cuthbertson, the said Allan Cuthbertson is entitled to a liferent use and enjoyment of the fund *in medio*, and sustain his claim and rank, and prefer him accordingly, and decern; find that the fee of the said fund belongs to the issue of the testator's grandnephews and grandnieces existing at the date of the widow's death, whether their parents survived the testator's widow or not, and that the claimant John Lawford Young, as the sole issue of Thomas Young, one of the testator's grandnephews, is entitled to a share of the fee of the said fund along with the issue of his other grandnephews and grandnieces; remits to the Lord Ordinary to proceed farther in the cause, as shall be just and consistent with the foregoing decree of preference and findings; find the claimant Colonel Macdougall, liable in expenses in this competition to the claimant Cuthbertson; find the said Colonel Macdougall also liable to the claimant John Lawford Young, in the expenses incurred by him since the date of the said Lord Ordinary's interlocutor.'

Pet., ANGUS MACINTOSH, FOR RECALL OF INHIBITION.—Jan. 16.

Inhibition—Recall.

In October 1863, Janet Miller, No. 2, Pier Terrace, Pimlico, and J. A. Campbell, C.S., her mandatory, raised an action in the Court of Session against Mr Macintosh, of Holm, for the sum of L.85. At the instance of Mr A. Pullen, solicitor, London, who acts for Mrs Miller there, Mr Campbell intimated to Mr Somerville, S.S.C., the agent for Mr Macintosh, that

he had been instructed to use inhibition against Mr Macintosh upon the dependence of the action. Mr Somerville offered to give a guarantee for his client, to obviate the necessity of using diligence against him. Ultimately, Mr Campbell sent to Mr Somerville the form of a letter of guarantee with which he would be satisfied, and Mr Somerville sent the guarantee in the form required by Mr Campbell, on 13th October 1863. Mr Pullen, the English solicitor, was not, however, satisfied with what his correspondent had done, and accordingly instructed him to use inhibition. The letters were granted on 24th October, and recorded 2d November 1863. Mr Macintosh has now presented this petition to have the inhibition recalled on caution, and to have the respondents (the pursuers) found liable in the expenses of the recall.

The judgment of the Court was delivered by the Lord Justice-Clerk, who said—There was no doubt that the respondents were legally entitled to use inhibition upon the dependence of the action; but it lay with the Court to determine whether the inhibition should subsist, or upon what conditions it should be recalled. There was no dispute that the inhibition should be recalled on caution; the only question was as to the expenses of the recall; and in regard to these he (the Lord Justice-Clerk) had a very clear opinion. When Mr John Archibald Campbell accepted Mr Somerville's letter of guarantee, he did nothing more than any other practitioner would have done; and if English solicitors would not trust their correspondents, but desired to play with sharp-edged tools which they didn't understand, they must take the consequences. The respondents must be made liable in the expenses of the recall.

DAWSON v. STIRTON.—*Jan. 16.*

Reduction—Oath of Reference.

This is a reduction of an extracted decree pronounced in the Sheriff Court of Perthshire. Both Sheriffs had assoilzied the defender with expenses in an action for repayment of L.100 said to have been paid by mistake. Lord Barcaple reduced the judgment of the Sheriffs, and his interlocutor was reversed by the Second Division. The effect of the decision of the Inner House was to assoilzie the defender, as the Sheriffs had done. The pursuer thereupon put in a minute referring the whole cause to the oath of the defender. To this minute it was objected by the defender—1. That a reference to his oath was incompetent, in respect the decree in the Inferior Court had been extracted; 2. That there was an objection to the pursuer's title to sue which had not been disposed of; and 3. That the minute didn't refer specific averments, but the whole cause generally, to the oath of the defender.

The Court repelled the objections, and sustained the minute of reference, at the same time finding the defender liable in the expenses caused by his objections.

LAMON (INSPECTOR OF EASTWOOD) AND BROWN (INSPECTOR OF PAISLEY)
v. CAMERON (INSPECTOR OF LISMORE AND APPIN).—*Jan. 19.*

Poor—Settlement—Mora.

This was an action at the instance of the inspectors of the parishes of Eastwood and Paisley for relief of sums paid by these parishes since the year 1850 for the maintenance of Margaret Renfrew or Ewart, alleged to

be a pauper chargeable to the parish of Lismore and Appin. It appears that in 1850 a statutory notice under section 71 of the Poor Law Amendment Act was given by the inspector of Paisley to the inspector of Lismore. Some correspondence passed between the inspectors, which was closed in 1851 by a letter from the inspector of Lismore denying all liability. In September 1851 the parish of Eastwood undertook (it is said, under a mistaken impression as to the effect of the case of *Barbour v. Adamson*) the support of the pauper. Doubts came to be entertained by Eastwood as to its liability, but it did not take the step of giving the statutory notice to Lismore till 1860. In defence, the latter parish pleaded, *inter alia*, that the claim of Paisley was cut off by *mora*, and that the claim of Eastwood was cut off both by *mora*, and by the fact that no statutory notice, under the 71st section, was given by that parish till 1860. The Lord Ordinary (Kinloch) sustained these defences, and assoilzied the defenders. The pursuers reclaimed, and ultimately the case was advised to-day.

The Court were of opinion that the plea of *mora* had been satisfactorily established. For eight years the parish of Lismore heard nothing of the claim, and by that delay its power of establishing a defence on the merits was so seriously endangered that he had no hesitation in holding that all right of action had been cut off. In regard to the other point decided by the Lord Ordinary,—namely, that statutory notice, under the 71st section of the Act, given by one parish could not enure to another,—the Court gave no opinion, as it was not necessary for the settlement of the present case. Lord Benholme was prepared to hold with the Lord Ordinary, that notice under the 71st section of the statute given by one parish could not enure to and be founded on by another parish. Such notice, to be effectual, could only be given by a parish at the time supporting the paupers and claiming relief. Judgment of absolvitor.

Note, WM. SUTHERLAND, FOR POOR'S ROLL.—Jan. 21.

Process—Poor's Roll.

The applicant presented this note for the benefit of the poor's roll, to enable him to raise and carry on an action of divorce against his wife. He stated in the declaration emitted before the minister and elders of the parish of South Leith, that he had only one child, that he was twenty-nine years of age, and resided with his father in Leith; that he was at present employed in the Morningside Asylum as attendant on a gentleman now a patient in the Asylum; and that he received there nearly ten shillings a week, besides his board, and that he had no property. Appearance was made for the applicant's wife, who opposed the application on the ground that a party earning 10s. weekly besides his board was not in circumstances entitling him to the benefit of the poor's roll; and it was stated that his wife and child were not maintained by him. Reference was specially made to the case of *Muir*, 1st February 1850, in which an application for the benefit of the poor's roll, with a view to raising an action of divorce, was made by a man who was twenty-eight years of age, and earning L.12 per annum and his board, and whose wife and only child were not maintained by him, and refused by the Court.

The Lord Justice-Clerk—We must follow the precedent in *Muir's* case, and refuse this application *in hoc statu*.

Susp., MACGREGOR v. GORDON.—Jan. 21.

Entail—Destination to Heirs-General.

This was a suspension of a threatened charge for payment of the price of lands called Woodburn, part of the estate of Braid, sold by the respondent, Captain John Gordon of Oluny, to the suspender, on the ground that the respondent is an entailed proprietor, and therefore not in a position to grant the suspender a valid title to the lands, the subject of his purchase. The respondent admits that he possesses under a deed of entail, but maintains that the entail is invalid in respect that the destination is in favour of heirs whomsoever, excluding heirs-portioners, and that it is incompetent by the law of Scotland to execute an entail in these terms. The Lord Ordinary (Jerviswoode) gave effect to the view maintained by the respondent, and held the entail to be invalid. The suspender having reclaimed against that interlocutor, the Court to-day, after the counsel for the suspender had explained the nature of the case, deeming the question raised as of great and general importance, and one which ought to be authoritatively decided, appointed the case to be argued before the whole Court.

M.P. and Exon., M'LARTY v. M'LARTY.—Jan. 22.

Accumulation—Abatement of Legacies.

This is an action of multiplepointing and exoneration brought by the trustees of the late Colln M'Larty against John Freeman M'Larty and others, in which they claim exoneration after payment to the competing interests that may be sustained. The condescence of the *fund in medio* relates to (1) a property called Keill or Kilcomkeill; (2) the estate of Chestervale in the island of Jamaica, and effects thereon; (3) certain portions of ground in the town of Campbeltown, with the houses thereon, as described in the rights and title-deeds. A claim was put in for Mr John Freeman M'Larty, son of the testator, who claimed to be ranked and preferred *primo loco*, and preferably to all others, to the whole residue of the trust estate forming the *fund in medio*. Claims were also put in by the representatives of the two daughters of the late Mr M'Larty, each set of representatives claiming L.1000 each as an unpaid part of a provision bequeathed to them by the testator. Two questions were raised in the competition: (1) Whether a direction to apply the proceeds of the trust estate towards the improvement of the truster's heritable estate in Scotland, fell under the prohibition of the Thellusson Act? (2) Whether, seeing that there was a deficiency of funds, the daughters were entitled to payment of their provisions in full, to the exclusion of the son as residuary legatee? The Lord Ordinary (Kinloch) sustained the claim of John Freeman M'Larty to the *fund in medio*, and preferred and ranked him accordingly. The judgment of the Court on both points is embodied in the concluding observations of the Lord Justice-Clerk:—Taking the trust deed with the provision in favour of the daughters, and with the plan contained in the codicil for payment to the daughters, my opinion is that the residuary interest of the son cannot compete with the legacies of L.4000. I think the daughters have a preferable claim for what remains unpaid. On the whole case I propose to your Lordships to recall the interlocutor

of the Lord Ordinary, and to decide that the direction as to the disposal of the rental, so far as applicable to the heritage, is not illegal by the Thellusson Act; to reserve all questions as to the competition between the special provisions to the son, and the claims of the representatives of the daughters, for the balance of the L.2000 remaining unpaid, but to declare that this latter claim is preferable to the residuary interest of the son; and to remit to the Lord Ordinary to hear parties further.

English Cases.

NEGLIGENCE.—Appellants were in occupation of the minerals under a field which was in the occupation of respondent, and had sunk a shaft in that field for the purpose of getting the minerals beneath it. When they had ceased to work the shaft, they covered it over in such a manner as not to afford a proper and effectual protection for horses in the field. Respondent turned out a mare to feed in the field, and she fell down the shaft and was killed, without any negligence on the part of respondent; and it was held, appellants were liable to an action in respect of the injury caused to respondent by reason of the loss of his mare.—(*Groucott v. Williams*, 32 L. J., Q. B. 237.)

PARTNERS.—A, an ironmonger, having supplied ironmongery to the amount of L.189, to B & C, who were builders, agreed to join them in the purchase of some land for building, on the conditions that B & C should build the houses, A supplying the ironmongery required, and that on the completion and sale of the houses A should be paid the L.189 and the price of the ironmongery, and no more; and that, if no profit was realized, A should be a loser. An agreement was accordingly entered into by all three with the landowner for the purchase of a piece of land, and the three bound themselves to complete buildings upon it according to certain plans, the vendor agreeing to make advances to the three to enable them to complete the building, and the three being jointly bound to pay the purchase-money, and the conveyance when all was paid to be to the three, or as they should direct. B & C having ordered timber of plaintiff, it was supplied on their credit (plaintiff being ignorant of A's having any interest in the building), and it was used on the building. It was held (*Wightman, J., dissentiente*) that A was not jointly interested with B & C in such a way as to make him a partner and liable for the timber. Mellor, J.: The decisions of the Courts with reference to this branch of the law have not been uniform; but since the case of *Cox v. Hickman* (8 H. L., Cas. 868; 9 Com. B. Rep., N. S. 47; 30 L. J., C. P. 125) I think that the principle applicable to the facts of the present case is sufficiently clear to determine the result in favour of the defendant Jukes. In *Cox v. Hickman*, Lord Cranworth, in his judgment, thus expresses the rule of law: 'It is often said that the test, or one of the tests, whether a person, not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in the profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim, but the real ground of the liability is, that the trade has been carried on by persons acting on his behalf.'—(*Kilshaw v. Jukes*, 32 L. J., Q. B. 218.)

PRINCIPAL AND AGENT.—Whatever information comes to the agent whilst he is acting as agent, and within the scope of his employment as such agent, is binding on the principal; but the principal is not bound by such agent's

knowledge of facts acquired by him in a prior transaction when in the employ of another person. Plaintiff placed goods in the hands of H to sell in his own name and as owner, which defendants bought of H, through C, their broker. Defendants did not know the goods belonged to plaintiff, but C did, from having been previously in the employ of H, but not from anything which was communicated to him when acting as defendant's broker. It was held, defendants were not affected by such knowledge of their broker, and were therefore entitled to set off a debt due to them from H, against plaintiff's claim for the price of the goods. *Erle, C. J.*: The most pernicious consequences would ensue, if, having employed a broker (who perchance has, at some time or another, received some information), the validity or invalidity of one's rights should depend on whether a jury should find that something of what had occurred before, should remain in his memory at the time he made the contract. The doctrine stated in the passage cited from *Tudor's Leading Cases in Equity*, is to the effect I am now holding, namely, that the notice to bind the principal must be given or imparted to the agent, when agent in the transaction. Here (Chaplin received knowledge whose goods they were only when he was not acting in the capacity of agent for the defendants.—(*Dresser v. Norwood*, 32 L. J., C. P. 201.)

SHIP AND SHIPPING.—In the contract of a shipowner to carry goods shipped on board his vessel, there is no implied condition that the vessel shall be seaworthy. But to an action by the shipowner against the merchant who shipped goods on board, for the latter's share of an average loss, it is a good plea on the ground of avoiding circuity of action, to plead that the ship was not seaworthy at the commencement of the voyage, and that the said average loss was caused and arose from and in consequence of such unseaworthiness.—(*Schloss v. Heriot*, 32 L. J., C. P. 211.)

TRUCK ACT.—If an artificer, engaged in an employment which comes within the provisions of 1 & 2 Will. IV., c. 37, receives of his own accord goods at a shop kept by his employer, and a corresponding amount is deducted by his employer from his wages at their next settling, this is a payment of wages in goods within the meaning of section 3, and subjects the employer to the penalties of section 9. If payment of wages has been made in goods, no subsequent payment of the wages in cash can purge the offence so committed; the provisions of the Act which declare the payment void, and also illegal and punishable, being cumulative.—(*Wilson v. Cookson*, and *Fisher v. Jones*, 32 L. J., C. P. 215, M. C. 177.)

CONTRIBUTORY.—The 54th section of 7 & 8 Vict., c. 110, prohibits the transfer of his shares by a shareholder only if he shall not have paid the full amount payable as well as due, in respect of every share held by him. Therefore, in a case governed by that Act, non-payment of a call made before, but not payable until after the execution of a transfer, forms no objection to the validity of the transfer. The non-return of a transfer to the Registrar of Joint-Stock Companies, under 7 & 8 Vict., c. 110, s. 13, though leaving the transferor liable for the debts of the company as between himself and the creditors of the company, does not leave him so liable as between himself and the other shareholders; and, consequently, the omission to make such return affords no ground for placing him on the list of contributories. *Kindersley, V. C.*—(*In re the British Provident Life and Fire Assurance Society, re Orpen*, 32 L. J., Ch. 633.)

PATENT.—The licensee under a patentee is estopped from disputing the validity of the patent during the continuance of the licence. The appellants were the owners of patents for the manufacture of carpets. The respondent applied for a licence to use the patents, and it was agreed that certain machines, embodying the inventions of the appellants, should be prepared under their superintendence, the respondent paying for the machines, and also paying certain agreed royalties upon the carpets manufactured therewith. This agreement was acted upon; and whilst being acted upon the respondent obtained, from a different quarter,

other machines, which also embodied the appellants' inventions, and used these machines as well as those supplied by the appellants. The appellants filed a bill in Chancery for an account of royalties in respect of the user of both sets of machines, whereupon the respondent, by way of defence to the appellants' claims in respect of the machines not obtained from them, disputed the validity of the appellants' patents. It was held (by the House of Lords) that the agreement constituted the respondent a licensee of the appellants, and that, so long as he thought fit to claim the benefit of the agreement in respect of the machines supplied by the appellants, he was estopped from denying the validity of the patents, and must pay royalties in respect of the user of both sets of machines. It was held, also, that no term being stipulated for the continuance of the agreement, the respondent might, if he chose, decline to pay royalties thereunder altogether, leaving the appellants to their remedy for infringement in respect of the use of any of the machines.—(*Crossley v. Dixon*, 32 L. J., Ch. 617.)

RAILWAY.—No general notice given by a railway company is valid in law for the purpose of limiting the common law liability of the company as carriers; but such common law liability may be limited by such conditions as the Court or Judge shall determine to be just and reasonable; so held by the House of Lords, and—per the Lord Chancellor and Lord Wensleydale (Lord Cranworth and Lord Chelmsford dissenting)—such conditions must be embodied in a special contract in writing, to be signed by the owner or person delivering the goods. Held, further (Lord Chelmsford dissenting), that a condition that the company would not be responsible for the loss of or injury to marbles unless declared and insured according to their value, was neither just nor reasonable, as the effect of such a condition would be to exempt the company from responsibility for injury however caused, whether by their own negligence, or even by fraud or dishonesty on the part of their servants. It was held, further (Lord Chelmsford dissenting), that a letter stating such condition did not constitute a special contract in writing, the words 'not insured' being insufficient either expressly or by reference to import the condition itself into the letter.—(*Peck v. the North Staffordshire Rail. Co.*, 32 L. J., Q. B. 141.)

RAILWAY.—A railway company which carried on the business of common carriers, and were empowered by their private Act to charge 'for the carriage of small parcels,' that is to say, parcels not exceeding 500 lbs. in weight each, 'any sum which they think fit,' charged a through rate for the carriage of goods, which rate included their collection and delivery as well as conveyance on the line of railway, and was charged in all cases, whether the goods were collected and delivered by the company or not. The company formerly made a rebate off such rate for collection and delivery, if the same were done by the customer, but the company afterwards refused to make any rebate for this off the rate charged for the carriage of goods under 500 lbs. weight. Plaintiff, who was a carrier, delivered goods under 500 lbs. weight at various stations of the company's railway for carriage on their railway, and was compelled by the company to pay the rate so charged for carriage without any rebate for collection and delivery, although such collection and delivery had been done by plaintiff and not by the company; and it was held, by *Williams, J., Byles, J., and Keating, J. (Erle, C. J., dissentiente)*, that plaintiff was entitled to recover back from the company the amount of such rebate in an action for money had and received.—(*Baxendale v. the Great Western Rail. Co.*, 32 L. J., C. P. 225.)

COPYRIGHT.—By the International Copyright Act, 7 & 8 Vict., c. 12, s. 19, a British subject who first publishes abroad, is, equally with a foreigner, deprived of any copyright save such as he may acquire under that Act; and if there be no treaty in force giving effect to the Act in his particular case, he has no copyright in this country; and in reference to the right of dramatic representation, first representation abroad is a first publication abroad within the meaning of section 19 of the Act. Wood, V. C.: The 19th clause expressly says, that neither the author of dramatic pieces, nor other pieces there men-

tioned, which shall, after the passing of the Act, be first published out of her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act. It says, in other words, that this Act having been passed, if any person, British subject or not, chooses to deprive this country of the advantage of the first representation of his work, then he may get the benefit of copyright if he can, under the arrangement which may have been come to pursuant to 7 & 8 Vict., c. 12, between this country and the country which he so favours with his representation; but if he chooses to publish his performance in a country which has not entered into any treaty, or made any such arrangement with regard to copyright, then this country has nothing more to say to him; he must be taken to have elected under which of the two statutes with respect to copyright he wishes to come, by performing his work in one country instead of the other, and he is thereby excluded from all advantage of publishing in the other.—(*Boucicault v. Delafield*, 33 L. J., Ch. 38.)

FRAUD.—In the year 1771 G. assigned fifty-five shares in a Scotch company called Carron Company to his bankers as a security for a debt and further advances. In 1813 the bankers sold fifteen of the shares to J. S., the then manager of the Carron Company, and in 1817 the then personal representative of G. sold the remaining forty shares to H. S., the then London agent of the company. J. S. continued manager of the company up to his death in 1825, and the fifteen shares bought by him were subsequently sold by his representatives. H. S. continued agent of the company until his death in 1851, and the forty shares were still standing in his name. In 1862 a bill was filed by the personal representative of G., then recently constituted in England, against the personal representatives of J. S. and H. S., alleging that J. S. and H. S. had fraudulently misrepresented the state of the affairs of the company, whereby they had been enabled to purchase the fifteen and forty shares respectively at an undervalue, and praying retransfer of the forty shares, and that the estates of J. S. and H. S. might, jointly and severally, answer for the difference between the purchase-money and the value of the fifteen shares. To this bill a general demurrer was filed by the representatives of J. S., for want of equity and multifariousness, and this demurrer was allowed by Wood, V. C., without liberty to amend the bill. On appeal, the Lords Justices differed from the Vice Chancellor, and overruled the demurrer, holding, that where a person standing in the relation of confidential agent to another, has, by his participation in a fraud, induced the latter to part with his property at an undervalue, his representatives may be proceeded against in equity to make good the loss occasioned by fraud, even though the agent himself derived no pecuniary benefit.—(*Walsham v. Stainton*, 33 L. J., Ch. 68.)

LANDS CLAUSES CONSOLIDATION ACT.—F. was lessee of a house and garden, and of a strip or piece of meadow land separated therefrom by a road originally made for the convenience of himself and the lessees of the adjoining houses, but which road was afterwards thrown open to the public. Each of the other lessees had also a strip of land on the other side of the road. The leases contained covenants restraining the lessees from building on the strips, and the strips were by arrangement all thrown into one piece, and were used by F. and the other lessees in common as cricket and pleasure ground; the whole being, however, also let to a butcher for grazing purposes. A railway company required this piece of land for the construction of their line; F. insisted that the company, if they took the land, must also take his house and garden; and on their proceeding to obtain possession under the provisions of the Lands Clauses Consolidation Act, filed his bill for an injunction. The Master of the Rolls refused an interlocutory injunction, considering it doubtful whether the strip of meadow land was a 'part of a house,' within the meaning of the 92d section of the Lands Clauses Act. On appeal, the decision was affirmed, Lord Justice Turner

agreeing with the Master of the Rolls, on the ground that the strip of land being held for pleasure only, and not of necessity, for the enjoyment and occupation of the residence of the plaintiff, it would not have passed by a conveyance of the 'house' simply. Dissentiente Lord Justice Knight Bruce.—(*Fergusson v. the London, Brighton and South Coast Rail. Co.*, 33 L. J., Ch. 29.)

LANDS CLAUSES CONSOLIDATION ACT.—The H. Railway Company agreed to pay for certain lands which they required, a sum equal to thirty-five years' purchase on the ground-rents. The lands required were held in lease with other lands, and an apportionment became necessary, in the course of which considerable expenses were incurred. It was held by Wood, V. C., that the costs of apportioning the ground-rents must be regarded as incurred in ascertaining the price, and not as incidental to the conveyance or deduction of title, and that the company was otherwise not liable to pay the same under section 82 of the Lands Clauses Consolidation Act.—(*In re the Hampstead Junction Rail. Co.*, *ex parte Buck*, 33 L. J., Ch. 79.)

EXECUTOR.—Testator bequeathed the residue of his personal estate (which included certain shares in the P. and N. I. Gas Companies) to trustees, upon trust to permit his wife to enjoy the annual income thereof during her life, and after her death, testator directed his trustees to transfer into the name of C. B. twenty-six shares in the P. Gas Company, and to transfer into the names of each of his nieces, E. and M., fifty shares in the N. I. Gas Company; and into the name of J. B., the remaining fifty shares in the N. I. Gas Company; and testator expressly authorized his trustees to permit his personal estate invested at his decease to continue in the same state of investment. It was held by Wood, V. C., that having regard to the particular frame of the will, any calls made during the life of the widow in respect of the gas shares, must be paid out of the general residuary estate.—(*Re Box's Trust*, 33 L. J., Ch. 42.)

SUCCESSION DUTY.—The consideration of marriage is not a valuable consideration in money or money's worth within the meaning of section 17 of 16 & 17 Vict., c. 51, and a jointure rentcharge settled in consideration of marriage is therefore not exempt from duty. Nor is the release by the lady of a bare possibility of future dower or freebench a sufficient consideration to exempt the jointure from duty. On the marriage of G. B. with G. C. N., real estates were limited by the father and elder brother of G. B. to the use that G. C. N. might, in case she survived G. B., receive during her life for her jointure, in lieu and satisfaction of dower and thirds, a yearly rentcharge of L.800, to be issuing thereout, without any deduction or abatement whatsoever on account of, or in respect of any taxes, charges, impositions or assessments already taxed, charged, assessed or imposed, or thereafter to be taxed, charged or imposed, on the hereditaments, or on the said annual rentcharge, or on the said G. C. N. or her assigns, in respect thereof, by authority of Parliament, or otherwise howsoever. The marriage took effect, and G. B. died after the passing of the Succession Duty Act, in the lifetime of G. C. N. It was held, by the Lord Chancellor, first, that the jointure was a 'succession' within the meaning of the 2d section of the Succession Duty Act, and (reversing the decision of the Master of the Rolls) that it was not exempted from duty by the operation of the 17th section of the Act; and, secondly, that as between G. C. N. and the estates charged with the jointure, she was entitled to receive it free from succession duty.—(*Floyer v. Banks*, 33 L. J., Ch. 1.)

ADVOCATE AND CLIENT.—In 1854 an estate was devised to P. S. by her father-in-law. The will was disputed by the heir, and various proceedings ensued. In April 1856 P. S. became acquainted with C. R. K., a barrister, who thenceforth for about three years acted as her counsel and confidential adviser, and mainly through his efforts her title to the estate was, after arduous litigation, established in March 1859. C. R. K. received no fees for his services, except those included in costs ordered to be paid by P. S.'s opponents. In May 1859 P. S., at C. R. K.'s request, and after being reminded by him of previous pro-

mises to give him L.20,000 for his services, conveyed the estate which had been recovered in the litigation to her own use for life, and after her death (subject to payment of her debts not exceeding L.10,000, and to the payment of L.10,000 to such persons as she should appoint) to C. R. K. in fee. The draft of this deed was prepared by C. R. K., but engrossed by a separate solicitor selected by P. S., who in the course of a long interview with her alone at his office, fully explained to her the nature and effect of the deed. It was held by the M. R. (who was of opinion upon the evidence that the influence arising from the relation between the parties still subsisted strongly at the date of the deed), first, that the transaction could not stand as a gift; secondly, that the previous promises of P. S. to remunerate C. R. K. L.20,000 for his services were insufficient to support the deed as founded on contract; and, thirdly, that the deed could not be upheld as having been executed in the fair performance of a moral obligation.—(*Brown v. Kennedy*, 33 L. J., Ch. 71.)

WILL.—J. N. V., by his will, directed his trustees to purchase L.8000 stock, and to pay the dividends to E. A. for life, and in case she should marry a person of good character having property equal in value to the above sum, and who should well and effectually, and to the good liking of the trustees, settle or secure to be paid to the issue of such marriage, an amount equal to the provision made by his will for such issue, he directed upon E. A.'s death, a transfer of certain parts of such L.8000 stock to such issue according to number. If E. A. died without issue, or if she married without regard to this condition, he gave the stock to his nephews. Capt. B. (who was possessed of property of the required amount) proposed marriage to E. A., and the trustees signified their approbation of him as a husband personally, and their acceptance of a bond from him as security for an amount equal to the value of the L.8000, 'provided his property is of the nature required, and the bond is a security within the intent and meaning, and according to the construction of the will.' Vice Chancellor Kindersley decided that the bond was not a sufficient security within the meaning of the will; but, upon appeal, the Lords Justices held that it was, and that the children of the marriage had become entitled to the specified shares of the L.8000 stock.—(*Bacchus v. Gilbee*, 33 L. J., Ch. 23.)

BOTTOMRY.—If money is advanced upon consideration that a bottomry bond shall be given, the fact that such a bond is executed subsequently to such advance, does not affect the validity of the bond, or place the advance upon the footing of personal credit. The existence of a local law of lien for advances may be pleaded, and becomes material as evidence that there was such an agreement at the time of the advance.—(*The Laurel*, 33 L. J., Pr. M. & A. 17.)

JURISDICTION.—Held by the Privy Council, on appeal from the Consular Court at Constantinople, that though as between Christian states a treaty is the ordinary, as it is the best proof of the consent and acquiescence of parties, it does not exclude other proof; and such may be found, especially as between a Christian and an Oriental state, in an active assent or a silent acquiescence with full knowledge. (2.) When a state allows another sovereign to exercise a jurisdiction within its territory, the decree of a court so created is binding upon a suitor submitting himself to such jurisdiction with the consent of his sovereign, whether he be the subject of the sovereign exercising the jurisdiction or of another power. (3.) Upon a question of what in a particular case is the proper mode of proceeding in such court, regard must be had to its usage and its manner of treating cognate causes, and therefore where an Admiralty jurisdiction is conferred, it is accompanied by the rule of the Admiralty Court to divide the total damages equally between the parties, where both are held to blame.—(*The Laconia*, 33 L. J., Pr. M. & A. 11.)

PROBATE.—Testator, in 1858, signed a will, which was not attested, purporting to be conditional upon his non-return from a contemplated journey. After his return from the journey he acknowledged his signature in the presence of two witnesses, who duly subscribed. Upon evidence that when the will was

executed, in 1859, testator was not contemplating any journey, the Court admitted it to probate.—(*In the goods of Cawthron*, 33 L. J., Pr. M. & A. 23.)

BANKRUPTCY.—By deed of arrangement between a trader and his creditors, and which was signed by six-sevenths in number and value of such creditors, all the estate and effects of the trader, except certain specified leasehold premises, which were stated in the deed to be held at a rack-rent, and to be of no value, and which the trader covenanted to assign to the trustees under the deed when required by them to do so, and except also the necessary wearing apparel of the trader and his family, were assigned to trustees in trust to pay thereout the costs of the trustees or trader in preparing and executing the deed, including all costs about the negotiations for the arrangement or matters in reference to the winding-up of the estate, and attending the execution of the trusts or incident thereto, and afterwards to apply the residue to the payment of the debts owing to the creditors of the trader rateably; and the deed contained a release by the several persons, creditors of the said trader, whose names and addresses were set forth in the schedule to the said deed. This was held a valid deed of arrangement under section 224 of the Bankrupt Law Consolidation Act, 1849, and binding on a creditor who had not signed it.—(*Spitzer v. Chaffers*, 33 L. J., C. P. 7.)

LANDS CLAUSES CONSOLIDATION ACT.—Plaintiffs, who were brewers, were the owners in fee of a public-house which was let for an unexpired term of seven years, and there was in the lease a covenant by the tenant not to sell on the premises any beer other than that purchased of plaintiffs; defendants were empowered, by their special Act (with which was incorporated 'The Lands Clauses Consolidation Act') to take the premises. It was held, that in ascertaining, under sections 18 and 63, the amount of purchase-money and compensation to be paid by defendants to plaintiffs, the additional value of the premises by reason of the covenant to sell plaintiffs' beer only was to be taken into consideration.—(*Burne v. the Mayor, etc., of Liverpool*, 33 L. J., Q. B. 15.)

MARINE INSURANCE.—The 'seaworthiness' of which, in the absence of express stipulations, there is an implied warranty in every voyage policy, is a relative term, depending on the nature of the ship, as well as of the voyage insured for; and in an action on a policy (in the usual form) parol evidence as to these facts is admissible to show the amount of seaworthiness implied. Therefore, on a policy 'on the "Ganges" steamer, from the Clyde to Calcutta,' it being shown that the vessel was a steamer of very light draught of water, constructed for river navigation, that this was disclosed when the policy was effected, and that (though it was impossible to make her absolutely fit for ocean navigation) the ship had been made as seaworthy as her size and construction would admit, the underwriters were held liable on her being lost by perils insured against. Cockburn, C. J.: There is, moreover, a rule applicable to warranties in contracts of sale, which, if it is to be considered good law, appears to me perfectly applicable to such a warranty as we are now considering. It is laid down by the older authorities, and has been handed down by the succeeding text writers to the present day, that even in the case of an express warranty, defects patent and known to the buyer must be taken to be excluded from the warranty. The rule appears to me, *a fortiori*, applicable in the case of an implied warranty. The law in an ordinary policy of insurance superadds to the express terms of the contract an implied term, because, in reason and justice, it may be assumed that such a condition was intended to lie at the foundation of the contract; but if the subject-matter of the contract renders such an implied term either wholly or partially inapplicable, why, contrary to what must be taken to have been the intention of the parties, should a warranty of seaworthiness be implied to the full extent of an ordinary policy? It is plain that the underwriters could not, under the circumstances, have honestly subscribed the policy, reserving an intention of insisting on seaworthiness beyond the capability of the vessel. Why, then, should such a stipulation or condition be imported into the contract?—(*Burges v. Wickham*, 33 L. J., Q. B. 17.)

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LAND AS A SUBJECT OF COMMERCE.

An Address on Land as a Subject of Commerce. By LORD CURRIEHILL. Read at the Congress of the National Association for the Promotion of Social Science, at Edinburgh, on the 8th October 1863.

LORD CURRIEHILL's address to the Social Science Association upon the subject of the transfer of land, furnishes another proof, if proof were wanting, of the groundlessness of the notion entertained by many, that those who from taste or position have devoted themselves to the culture of a department of the law are disqualified from judging of its defects or devising the appropriate remedies. Himself the greatest living authority upon the Law of Real Property, Lord Curriehill, in dealing with this department of the law for the purposes of popular exposition, lays aside the character of the mere lawyer, and seeks to contemplate his favourite study from the point of view of the legislator and political economist. His treatment of the subject well and amply redeems the promise implied in the title; and it is not too much to say, that of the many excellent addresses delivered by the Presidents of Departments at the Edinburgh Congress, that of Lord Curriehill was at once the most instructive and the most fertile in suggestions of practical utility. We gladly avail ourselves of the opportunity afforded by the publication of this address in a separate form, to offer a summary of its contents, and to examine the amendments in relation to the law of property which it is the object of the learned author to explain and enforce.

The introductory part of the address is chiefly occupied with explanatory observations upon the system of tenure now prevalent in Scotland, the differences between it and the proper feudal system, and the analogies which it presents to the emphyteusis of the Civil Code. Two conditions of the Scottish feu tenure are pointed out as characteristic qualities of the right; the one being, that the relation of superior and vassal constitutes a contract, the conditions of which are binding upon purchasers; the other being, that, as a result of this relation, the original estate (*plenum dominium*) is extinguished, while two new estates are created, each of them less than *plenum dominium*. These qualities being assumed to be constant, because inherent in the nature of the relation of superior and vassal, the learned author maintains, or at least implies, that nothing more should be required in order to the completion of a title than what is necessary to bind the parties to the contract and to transfer the property. He says:—

But while these qualifications of the rights of parties appear to be inherent in, and inseparable from, this tenure,—there are adhering to it in Scotland some other things, which might perhaps be advantageously and safely modified or dispensed with as prejudicially affecting land as a marketable subject. I shall mention two of them:—

One is the interposition of the superior, which is at present required in order to complete a purchaser's title, by the former either granting a warrant to infest the latter, or by confirming his infestment after it is taken. This appears to be now unnecessary. Publication in a register of the transfer from the seller to the purchaser, is the appropriate and the only solemnity which is necessary for that purpose. This is not now a matter of speculative opinion; for it has been proved by experience. Since the year 1845 nothing more has been required for that purpose than such publication in the Register of Sasines; and such registration has been found to be quite sufficient, in so much that the solemnity of infestment has now been almost universally abandoned in practice. And this being the case, why should the interposition of the superior still be required? It serves no good purpose. It is worse than useless. It adds to the expense of the title. And the theory of its being necessary to complete the transfer from the buyer to the seller has given rise to a fiction—that a mid-superiority is left in each seller, and requires, for its defeasance, the superior's confirmation; and the subsistence and sometimes the accumulation of these fictitious mid-superiorities often create confusion in the title, and even danger to the feuar's right. Neither these fictitious mid-superiorities nor the superior's interference should be continued. In the year 1838 commissioners who were appointed by the Crown to report on Scottish conveyancing, and who were very accomplished lawyers and conveyancers, reported in decided terms that such interposition should be dispensed with; and the time appears to have arrived when that recommendation should be carried into effect.

The other amendment which suggests itself to me upon this tenure is, that the composition of a year's rent, which is payable by law, independent of contract, to the superior on the entry of a purchaser, ought to be commuted. The right of the superior to such a payment is extremely precarious; as, on the one hand, sales may never take place, or, on the other hand, may often occur. And as to the feuar, the effect of this casualty is pernicious, because when he expends his money or labour in improving the subjects, the superior gets the benefit of

such expenditure—the year's rent being estimated according to the annual value of the subject, not as it was when the grant of it was made by the superior, but as it may be, with all its improvements, however costly these may have been, at the date of the entry. The hardship of this is well illustrated by cases where houses or other edifices are erected at a great expense. On a sale of these edifices, the year's rent which is exigible from the purchasers often greatly exceeds what was the value of even the fee-simple of the sites at the time these were feued; and so a year's return for the capital and labour expended by the feuar goes into the pocket of the superior. When the contracting parties make express stipulations in the contract as to such composition, as is now generally the case, of course effect should be given to their bargain. But when the casualty arises from the law itself, why should it not be dealt with, as the legal casualties which arose under the feudal tenure were by the Act abolishing ward-holding—viz., by commuting the value of the casualty into an addition to the annual feu-duty, under judicial superintendence?

In these suggestions we entirely concur. A superior, in so far as his right to feu-duties is concerned, is substantially in the position of a fundholder, his security being, not the credit of the exchequer, but the property of a certain piece of land. Composition and relief duties do not form part of the proper modern contract of feu-holding. They are relics of the old feudal exactions, and ought, like them, to be commuted for payment of a fixed annual charge.

Lord Curriehill thus estimates the general results of our system of feudal tenure, considered in its relation to commerce:—

The tenures thus generally described leave commerce in land quite free. Although the right of property is split between two or more parties, yet each holds his own share independent of the others, and has the free disposal thereof without their consent. And although the seller's right may be clogged by conventional conditions in the original contract, this cannot be avoided without creating the still greater evil of interfering with the liberty of parties to make their own bargains; and a purchaser of the right of either of the parties to a contract of feu-farm is no more entitled to complain of the conditions attached to the right by that contract, than a purchaser of shares in a joint-stock company has to complain of the conditions under which the shares were constituted by the contract of the company. The result is that the interests of commerce in land are quite consistent with our existing land tenures, but that some incidents of these tenures admit of amendment.

Lord Curriehill next states the inquiry, What effect is produced on land, as a subject of sale, by the existing entail law of Scotland? His lordship is of opinion that the existing law is satisfactory, and that there is no ground of complaint that it 'interferes unduly' with land as a subject of commerce.

It allows the owner of property a fair exercise of the power of testamentary disposal, and only restrains what has been found by experience to be an excessive and mischievous use of it. And, on the other hand, no purchaser need ever be entrapped into a purchase of an entailed estate; because the fetters of the entails, besides expressly qualifying the title of every heir in possession, must be published, both in the Register of Sasines and in a separate Register of Entails.

But I foresee an anomalous position into which heirs of entail may come a few years hence—when many of them will be entitled to disentail or sell the estates

under the authority of the Court of Session, without the consent of any other heir. Even although they should then abstain from exercising that power, the estates will be liable to be taken in execution for their debts, in virtue of an express clause in the statute to that effect. But will *sales* by heirs of entail, who shall be in that predicament, be effectual? The statute is silent on the subject; and it is not easy to find in the statute any enactment which would protect a sale in such circumstances. On the other hand, it is as difficult to see how such a sale could be challengeable by the subsequent heirs of entail, when the right or *jus crediti* conferred upon them by the entail is extinguishable by the seller at his own option. It would be well if this difficulty were obviated by the Legislature before the time shall arrive when it may emerge.

It would be too much to expect from a conservative lawyer an admission of the impolicy of the entail laws; but we would respectfully ask Lord Curriehill what he would consider an 'undue interference' with commerce in land? Is it or is it not the case, that under the present law estates may be entailed for an indefinite duration by the simple expedient of 'resettling' the property after the birth of an heir? It has been so in England, where entails have for a long time subsisted on the footing on which Scotch entails have been placed by Lord Rutherford's Act; and so long as curators are authorized to consent to a disentail on behalf of minor children on the understanding that the estates are to be resettled, so long will property be handed down from generation to generation burdened by the two conditions of non-liability to alienation, and non-liability to eviction for debt. This is something more than mere interference with commerce in land; it is complete exclusion, assuming that reasonable precautions are taken.

We confess we are not sanguine as to the success of any attempt to liberate land from the fetters of the existing Entail Laws; but we think that justice and political expediency alike point to an amendment of the character suggested by Mr Bright in his recent address to the electors of Birmingham, namely, a restriction of the right of settling property on unborn descendants to the single case of settlements upon issue in a contract of marriage. The restriction ought to be made applicable to personal property as well as real. It is just that a party entering into the relation of marriage should be empowered to deprive himself of the power of alienating his property, for the purpose of making provision for the future support of his family. For any other purpose such a restraint upon proprietary powers is inexpedient, as being an undue interference with the freedom of commerce, and as such it ought to be discountenanced by the law. In the meantime, it appears to us that much benefit would result from an enactment enabling entailed proprietors

to sell any part of their estates with the sanction of the Court, on condition of the money being paid into Court and re-invested in terms of the settlement. This would enable proprietors of land available for building purposes, in the neighbourhood of towns, to dispose of it to others to whom it would be useful, and, by the process of re-investment, virtually to exchange it for the 'broad acres' which are more congenial to the tastes of the territorial aristocracy.

Lord Curriehill proceeds in the third division of his subject to treat of the security afforded to purchasers of property in Scotland by our system of registration; and while paying a just tribute to the acknowledged excellence of that system, points out some sources of error to which purchasers are liable. He says:—

But many grounds of challenge may exist which do not appear in these registers, and which purchasers may have no means of becoming acquainted with; and the difficulty remains, are or are not these latent and undiscoverable claims to be available against them? Without attempting to enumerate the varieties of these claims, I may mention, *as examples*, that if the title of the seller or of any of his predecessors had previously been judicially rescinded by a degree of reduction: or if it had been revoked by the person from whom his title was derived in virtue of a power of revocation reserved to him in that title—there would be no entry of the proceeding in the registers, and the seller would still appear as the ostensible, although he would not be the real owner. This also would be the case if the seller's title had been made up on the footing of his being the heir of a preceding proprietor, while, in truth, that character belonged to a different person;—or if the preceding owner from whom the purchaser obtained his title had been disabled by mental incapacity or nonage from making the conveyance which is the seller's title. In these, and in numerous other cases, a purchaser, while in ignorance of the objections to the seller's title, and without having any means provided to him of acquiring a knowledge of them, may have made his purchase and paid the price, and may, moreover, have expended large sums in erections or other improvements on the subjects; and, after all this, the party to whom the subject truly belonged, but whose claim was latent and unknown, may come forward and challenge his title, and insist upon his relinquishing his possession. Although in Scotland some of those grounds of challenge which are called personal do not affect honest purchasers, yet many of them, which are called real, do so. It is a most important and difficult question in jurisprudence, whether any or what remedy ought to be adopted in such cases? I speak upon the subject with much diffidence; but as, in the course of long experience, I have often witnessed and sympathised with the distress created by the existing state of the law, and remedies have suggested themselves to my mind, I shall mention them, crude as they are, in the hope that they may be sifted and criticised.

These suggestions, which we shall quote *ad longum*, have been to some extent, though not entirely, anticipated in the Report of the Royal Commission on the Land Registers, which was presented to Parliament last session.

The first is, that our existing registers might be made more extensively available. As our law exposes not only usurpers of the right of property, but even honest purchasers from them, to the risk of such claims and objections, the interests of commerce and justice to purchasers appear to require that these

should be published, so as to enable third parties, who might be affected by them, to discover their existence. Such a publication in a register appointed for the purpose would in effect operate as inhibitions do. Indeed, under the existing law, the remedy of inhibition, as already mentioned, is available in such a case if it proceed on an action instituted for the purpose of rendering the claim or objection available. The Register of Inhibitions, therefore, might be the appropriate one for publishing such claims and objections, although the notice of them might be some caveat more simple and less expensive than formal inhibitions. As to another class of cases—viz., those where titles which are standing in the Register of Sasines have been judicially rescinded, some examples of which I have referred to—it might be fitting that the proceedings rescinding these titles should be published in the same Register of Sasines.

Secondly, if the use of these registers were to be thus extended, then the principle, which is already in operation as to the registration of infestments, should be similarly extended—that is to say, such claims or objections, if not so published, should be of no effect against honest purchasers ignorant of them; because, when proper means are afforded to the parties of so publicly warning all concerned of the existence of claims or objections, and when, by their failure to avail themselves of these means, and by their so keeping the claims latent, third parties are ensnared into purchases, the loss should be borne by the former, not by the latter. But, on the other hand, if so published, these claims or objections, if they be well founded, should be effectual against purchasers, who had not availed themselves of the means so provided for their information and protection.

Thirdly, to guard against the abuse of such publications, and to enable the parties against whom such claims and objections might be published, to have them judicially disposed of, some remedy would be requisite; and, in the practice of Scotland, two remedies which now exist, might be made available. One is the summary application to the Supreme Court to recall inhibition. The other is an action by which the claim or objection, if not well founded, or even if not defended when it is challenged, is rendered ineffectual against the party challenging it and his successors. It is denominated an action of *reduction-improbation*. By means of it, parties making such claims or objections are compelled to produce judicially the writings on which their pretensions are founded, under the sanction, that if they fail to do so, these writings are dealt with as forgeries and nullities, so far as the parties suing the action are concerned. It is characteristic of that action that such a decree, even although pronounced in absence, cannot be thereafter reviewed. This rule has of late years been somewhat relaxed in practice; but this should not be the case when a purchase is made on the faith of the decree. If, again, the writings should be produced, the merits of the claims are judicially tried and decided.

And fourthly, the period of time—the lapse of which, by the positive prescription, excludes such claims and objections, and indeed claims and objections of all kinds, against rights held by ostensibly regular titles—might be safely shortened. That prescription was established in the year 1617, simultaneously with the Register of Sasines; and while that register has been of vast benefit in protecting the right of property in land from latent objections, the prescription has been no less so in protecting it from antiquated ones. The import of the enactment is, that when a person and his predecessors have possessed an heritable estate peaceably and uninterruptedly for forty years in virtue of a regular title, that title is thereby rendered indefeasible on any ground whatever, either by the Crown, or by any other party. This law, accordingly, saves purchasers from the necessity of procuring searches of the records farther back than for forty years. Now, it deserves consideration whether that period ought not to be shortened, in questions at all events with honest purchasers and other onerous transferees? When an estate is offered for sale, which has been in the full and peaceable possession of the seller and his predecessors without interruption from any quarter for a period of, let us say, twenty years—and that, too, upon a title, or series of titles, which on their face are unimpeachable—do not the

interests of commerce and fair dealing require that a purchaser in such circumstances should be protected from claims or objections, which during all that period had been allowed to lie latent and unknown? I believe the feeling generally prevails, that the prescriptive period ought to be shortened to the extent I have mentioned at least; and many think, and perhaps with reason, that it should be limited to ten years. But even although this suggestion should be adopted to any extent, to the effect of protecting honest purchasers, the true owner might still be allowed to seek indemnification from the seller within the present prescriptive period.

Two observations occur to us upon these suggestions. First, the proposition that parties claiming an interest adverse to that of the registered proprietor might be applied with great facility and accuracy to what is termed the 'Search-Sheet' system of registration in the Commissioners' Report, and which, as our readers are aware, is nothing more than a tabular index or key to the Register, in which the titles of all the deeds relative to one estate are entered consecutively in the form of a ledger, with a reference to the volumes in which the deeds are recorded at length. The entry of a caveat in the Index or 'Search-Sheet' would effectually apprise an intending purchaser of the existence of objections, and put him on an inquiry. The other observation we have to make is, that the period of prescription ought, in our opinion, to be twenty-five, and not twenty years. It is of the essence of prescription to exclude all inquiry into the validity of the deed with which series of titles commences; and a period of prescription shorter than the legal period of minority might, in exceptional cases, have the effect of depriving a minor heir of an opportunity of vindicating his legal rights; *e.g.*, in the case of a remoter heir making up a little during his infancy and afterwards selling to a *bona fide* purchaser.

We do not enter upon the subject of the comparison instituted by the learned author between our system of registration and that which has recently been introduced, though only with partial success, into England and Ireland, further than to observe, that the system of a preliminary investigation followed by a judicial declaration of title, although doubtless open to many of the objections urged against it, was essential to the successful introduction of the system of registration of titles into these countries; because no one would have taken the trouble to register, if the object of doing so was merely to lay the foundation of a title which would not be complete until the elapse of the prescriptive period of sixty years. With us there is no necessity for the machinery of a judicial declaration of title, because the whole landed property of the country has been upon the Register

for centuries, and a search of the Register for forty years furnishes a ready means of ascertaining whether the seller has a good title to give; and the expense of a search, although sometimes high in proportion to the value of the property, is greatly less than the expense of a judicial investigation. In this respect we are in advance of our neighbours, and the expedients to which they have resorted to set their system agoing are simply inappropriate to the more matured condition of our national registry.

We conclude this notice of a very interesting paper with an excerpt stating the nature of the facilities which the British Government has given to settlers in the colonies for the acquisition of Crown Lands, merely adding the expression of a wish, that instead of exacting a price which is beyond the means of the labouring class, the Government would encourage emigration by free grants upon condition of residence and cultivation. The passage is as follows:—

Until modern times this principle was perhaps not distinctly understood. The Crown was in the practice of making gifts of large districts; and as, in many cases, the donees could command neither the capital nor the labour which was necessary for reclaiming and cultivating them, they were allowed to remain in their natural waste state. But about thirty years ago this system was changed. Government published ordinances entitling any of the subjects of the British Crown, whether they were natural-born or had become denizens, to acquire lands in any of these districts upon conditions which, besides being very moderate, were intended to operate for behoof of themselves. As the land could not be reclaimed and made available to the owners, and through them for the public benefit, without capital and labour being simultaneously employed upon them, and without roads and other public works being formed, there was desiderated some plan by which all these objects might be effected. A series of ordinances accordingly issued for that purpose from the Colonial Office—particularly in the year 1831 and two following years—the import of which, speaking of course very generally, was that all these lands should be sold to British subjects, as a demand should arise for them, by public roup or private bargain, according to circumstances, on two conditions. One of these was, that the lands should be offered at upset prices (not rents, be it observed, but prices) ranging from about half-a-crown upwards, but seldom reaching a sovereign per acre. The other condition was, that the purchasers should, within certain prescribed periods, have certain proportions of the lands cleared and under cultivation, under the penalty of forfeiting their rights. Then the money prices so to be obtained were not to come into the Exchequer as part of the ways and means of the mother country, but were to be employed partly in public works in the colony itself, and partly in assisting labourers to emigrate, so as to supply the labour market. These labourers, again, in consequence of the high wages they receive, are enabled in a short time, if they be duly industrious and parsimonious, to pass into the class of landowners. And, by their purchases, they, in their turn, add to the fund for supplying the labour market, and making public works. Under the system so established, emigration to those colonies, purchases of land there, the accumulation of wealth, and the general prosperity of the colonies, have taken place at a rapid rate and to an immense extent. This process is steadily advancing; and its effects as to the future history of our race will probably be stupendous. Although the lands already purchased are of

enormous extent, still, as I have shown you, these bear but a small proportion to the practically boundless tracts which remain unalienated, and are waiting to be appropriated by any of Her Majesty's subjects who may choose to acquire them on conditions such as those to which I have referred.

ANCIENT AND MODERN PLEADING CONTRASTED.

THE term *ground of action*, though employed every day in our legal arguments, is one which we do not find strictly defined in our institutional treatises. And yet, we believe, there are few legal terms which possess a more definite signification, or are more capable of having their signification distinctly ascertained and marked out. It is perhaps the *one* phrase applicable to our present system of pleading which possesses such a definite character; and therefore, in the view of a possible reduction of our system of pleading to more scientific precision, such a phrase becomes of incalculable value. It will be the object of the following paper to illustrate this signification, and to mark its application to the systems of legal procedure which possess the greatest interest for us,—namely, the ancient Roman, the English, and our own. The ancient Roman procedure, so far as we can trace it, possesses an interest for us on two grounds: historically, inasmuch as the system of which it formed a part has contributed in a large measure to the shaping of *all* modern legal institutions; and intrinsically, inasmuch as that system was founded on the widest experience, and shaped by the best trained legal intellects that the world has known. The English procedure possesses for us the double interest, that its courts and ours derive their authority from a common sovereign; and that, with far larger experience and more extensive business than ours, they have found the means of transacting that business with more despatch and satisfaction to the public. As, however, so much attention has been directed of late in this Journal to the English system of pleading, we shall rather assume that our readers are familiar with its leading characteristics, than attempt to describe them at length. Without further preface upon the merits of the different systems, let us indicate at once the use we mean to make of them here. We find in each of the three systems, a stage in which the *ground of action* falls to be stated by itself and apart from all extraneous matter, although the *mode* of statement slightly varies in each of them. Such is the *issue* in our own system as well as in the English; the one being framed with the assistance of the court, and the other directly placed on

record by the parties. The corresponding process in Roman procedure we shall presently describe more at length. Having identified these steps of procedure and denoted their common object, we obtain a clearer conception of that common object than we could have by the contemplation of one system alone. Above all, we shall be thus enabled to import into the less precise system—namely, our own—something of the accuracy of thought and language obtained in those systems which have been elaborated by a wider experience and more pressing exigencies of accumulating business.

It is acutely observed by Mr Austin, that the *right to action*, by which phrase the word 'actio' in the Roman law may nearly be translated, is always a right founded on *delict* in the widest sense of the word. That is, the right to action implies a *wrong* or an *infringement of a right* committed or threatened. No court of justice, he remarks, will entertain an action without the suggestion of a wrong. To this principle, the *rei vindicatio* of the Roman law, and the *declaratory actions* in ours, are no exception. Although in form their conclusion is the assertion of a *real right*,—that is, a right availing against persons *in general*,—yet the action is brought against a determinate person or persons who are in the course of infringing it, or are presumed to threaten its infringement; and the judgment can only constitute a *res judicata* with regard to the determinate person or persons against whom the action is so brought. The wrong or infringement of right actual or threatened, which thus gives a right of action, is what we call the *ground of action*. It follows that every ground of action is capable of statement in a single and distinct proposition. And this is true, although out of the same act or circumstance several grounds of action should arise.

For instance, if A walk over B's farm with a dog which worries B's sheep, he is liable to an action both for the trespass and in reparation for the damage. And each of the wrongs thus committed is a separate ground of action, and is capable of statement in a distinct proposition. Supposing A to be in pursuit of game, the right to which is reserved by C, the proprietor, he would be further liable in an action at C's instance. And the infringement of C's right would be capable of statement in a third distinct proposition. But he would be still further liable to a prosecution under the Poaching Act at the instance of the Procurator-Fiscal; and his infringement of the rights constituted by that statutory enactment would constitute a fourth and distinct ground of action.

We shall now attempt a short sketch of the method by which, in the Roman procedure, the grounds of action were laid judicially under the cognizance of the tribunals. In their earlier procedure, the grounds of action admitted by law were extremely limited. They were defined by the XII. tables, or by other statutory enactments, and were as precise and inelastic as the provisions of the English criminal law. The procedure now referred to was designated by the term *legis actiones*, whether because the right to action was given out by statute (*legibus*), in contradistinction to the actions allowed at a later period by the Prætor's edict, or because the ground of action required to be expressed in the very words of the statute.¹ A notable instance is given by Gaius of the precise technicality of these old proceedings. A person who brought his action for his vines being cut down, lost his suit because he should have used the word trees instead of vines, that being the expression of the law of the XII. tables by which the action was made competent.

The *legis actiones*, however, having grown into disfavour on account of their too great subtlety, were abolished, and it was made competent to proceed by *concepta verba* (words conceived to meet the nature of the case), that is, as they afterwards came to be called by *formula*.² In the course of time, too, the grounds of action competent were multiplied by the Prætor's edict, which allowed an action in many cases not provided for by statute, so that a system of procedure was provided elastic enough to meet every possible case. The application of the word *formula* to the proceeding first introduced under the name of *concepta verba*, marks a change not perhaps uncommon in the history of legal forms. That which, when introduced as a new process, taxes the invention to adapt it to various cases, assumes, as precedents multiply, a stereotyped form, the caution and indolence natural to practitioners (as to other human beings) choosing rather to copy a style than to exert the intellect. It was not, however, destined that the burden should remain upon the wits of litigants to frame their records without assistance from an authoritative guide. The album of the Prætor was a style-book published under legislative authority, and contained *formula* expressed according to every variety of ground of action upon which private litigants might model their pleadings (Cic. pro Q. Ros. Com. c. 8). And in the time of Cicero this public style-book was

¹ Gaius, iv. 11.

² Gaius, iv. 36.

so complete, as to furnish an argument that the litigant was without excuse who laid his action improperly.

The step of pleading by which the pursuer formally announced his ground of action was called the *intentio*.¹ This was very nearly equivalent to the *declaration* in English pleading, only it appears to have been still more concise and simple. The *intentio* was subsequently embodied in the *formula*, or record, upon which the cause was tried by the *judex* or *arbiter*, as the case might be. And from the numerous examples we have of styles of *formula*, we are enabled to see exactly what was the nature of the *intentio*. And here we may observe, that there is not the slightest trace in the Roman procedure of any detailed statement of facts appearing upon the pleadings or upon the record. And there is no trace that, after *litis-contestation*, the question between two litigants, whether as the subject of the immediate trial, or of the plea of *res judicata* afterwards, was limited or defined by anything except by the terms of the *formula*. If this be the case in the procedure of that jurisprudence on which a great part of our own law of evidence, and the entire conception of the plea of *res judicata*, is founded, it furnishes a strong argument against those who pretend that the detailed statement of facts, prevalent in our own form of pleading, is necessary to secure due notice of the facts to be proved, and to preserve a record of the question decided by the judgment in the cause.

The *intentio* was simply a statement of the ground of action. It was a single proposition containing the statement of a fact, and involving a legal consequence. Of its precise terms we can speak more distinctly, when we come to examine the *formula* in which it was embodied. It remains to indicate the nature of the other pleadings, which were all finally embodied in the same *formula*.

¹ The steps in a civil action previous to the final adjustment of the *formula* or record upon which the cause went to the *judex* or *arbiter*, appear to have been the following:—After the *in jus vocatio* or citation, and the *reus* or defender having become bound over (*vadatus*) to appear, there follows the *editio actionis*, by which the *actor* gives notice of the form of action by which he means to proceed. This he might do either orally or by writing, contained in a *libellum*, and given to his adversary. But it was even sufficient to point out to him on the Prætor's album the form of action on which he meant to rely. The next step was the *postulatio actionis*, a petition to the Prætor, which must have been very similar to the bills in our old practice, praying for the granting of signet letters. If the Prætor granted the action (*dabat actionem*) on the third day, both parties were summoned by the Prætor; and the cause being called in due course on the roll, the *actor*, in answer to the solemn interrogation of his *vadatus*, 'Quid ais?' announced his *intentio*, e.g., 'Aio te mihi mercedem, de quâ inter nos conveniat, ob polita tua vestimenta dare oportere.'—(Car. Sigonius de judiciis, Lib. i. c. 18, 19, 20, 21.)

The *reus* either denied the *intentio*, or replied to it by an *exceptio* (aut inficiabatur, aut excipiebat). The exception was a defence arising from a substantial ground, sufficient to avoid a condemnation, although the ground of action was well founded both in fact and in law. Many grounds of exception were laid down expressly and generally in the Prætor's edict; in other cases an exception was adapted by him to the specialties of the case, upon hearing the facts.¹ The exception is expressed negatively, and in a form to meet the *intentio* of the actor, and capable of being embodied in the same formula. Thus, if the defence be an agreement that action should not be brought for payment, the exception will run thus: *Si inter Aulum Agerium et Numerium Negidium non convenit, ne ea pecunia peteretur.*

It might be impossible to traverse the *exceptio* directly either in fact or in law, and yet there may be independent grounds why the sustaining of the defence should be inequitable to the actor. In such a case he is allowed to answer the *exceptio* by a *replicatio* so called, '*quia per eam replicatur atque resolvitur jus exceptionis.*' (Gaius, iv. 126.) There might be likewise an answer to the *replicatio*, in which case such answer was called *duplicatio*, which again might be followed by a *triplicatio*; and an unusual complication of circumstances has been known to carry the process even further than this.

The pleadings, when completed, were embodied in the *formula* under which the case was finally tried, and judgment pronounced by the *iudex* or *arbiter*, as the case might be,—an official who may be roughly described as similar to a Lord Ordinary trying an issue without a jury. The *formula* demands our attention as the all-important point in Roman procedure. In it were comprised, to use the language of our own law, at once the issue, the conclusions of the summons, and everything else in the record, which has any real bearing on the judgment to be pronounced. There were four parts belonging to the *formula*, though it was not necessary that every formula should contain them all. There were, 1st, The *demonstratio*; 2d, the *intentio*; 3d, the *adjudicatio*; and 4th, the *condemnatio*.

1. The *Demonstratio* points out the subject upon which the action

¹ Gaius, iv. 118. *Exceptiones autem alias in edicto Prætoris habet propositas, alias causâ cognitâ accommodat: quæ omnes vel ex legibus, vel ex his quæ legibus vicem optinent, substantiam capiunt, vel ex jurisdictione Prætoris proditæ sunt.*

arises, and is as follows: *Quod Aulus Agerius Numerio Negidio hominem vendidit*; or thus: *Quod Aulus Agerius (apud) Numerium Negidium Hominem deposuit*.

2. The *Intentio*, when the word is used to denote a constituent part of the *formula*, contains the complaint of the *actor*, and comprises, as we should say, both his ground of action and the conclusion of his summons. It runs thus: *Si paret Numerium Negidium Aulo Agerio sestertium X millia dare oportere*; or thus: *Quidquid paret Numerium Negidium Aulo Agerio dare facere (oportere)*; or thus: *Si paret hominem ex jure Quiritium Auli Agerii esse*.

3. The *Adjudicatio* is that part of the *formula* which remits to the *judex* to adjudicate the subject to one of the litigants; such as in the action between co-heirs (*familiæ erciscundæ*), or between co-partners (*communi dividendo*), or between proprietors of adjoining lands (*finium regundorum*), and runs thus: *Quantum Adjudicari oportet, judex Titio adjudicato*.

4. The *Condemnatio* is that part of the *formula* by which power is given to the *judex* to condemn (or decern) or to absolve (*i.e.*, *assoilzie*) [*ea pars formulæ quâ judici condemnandi absolvendive potestas permittitur*], and may run thus: *Judex Numerium Negidium Aulo Agerio sestertium X millia condemna, si non paret, absolve*; or thus: *Judex Numerium Negidium Aulo Agerio duntaxat X millia condemna, si non paret, absolvito*. It will thus be seen, that the *formula* was more than an issue, just as the powers of the *judex* were much wider than that of our jury, and that the remit to the *judex* contained the power not only to find upon the facts and to assess damages, but, as we should say, to decern in terms of the conclusions of the summons, or to assoilzie, as the case might be.

One important distinction with regard to the form of the *intentio* contained in the *formula*, remains to be noticed before we pass on to any practical application of the system we are examining. *Formulæ* were distinguished according to whether they were *in jus conceptæ* or *in factum conceptæ*. The *intentio* in the former involved a legal consequence along with the matter of fact, and this *formula* appears to have been employed in those cases where the legal consequence followed by the direct operation of the civil law. Such was the case in real actions, *quibus intendimus nostrum esse aliquid ex jure Quiritium*; in personal actions grounded on the civil law, *quibus intendimus nobis dare oportere*; or, *pro fure damnum*

decidere oportere. In the formulæ *in factum conceptæ*, the intentio confined itself to the statement of a fact; and this appears to have been employed in the class of actions where a remedy was promised by the Prætor's edict, in the case of certain species facti there set down. In this case it was sufficient in the intentio to libel the fact in terms of the edict, and the condemnatio gave power to the judex to condemn or acquit, according as he found the fact proved. For instance, the following are examples of formulæ *in jus conceptæ*:—*Judex esto: si paret, fundum Capenatem, de quo Servilius agit cum Catulo, Servilii esse ex jure Quiritium, neque is Servilio a Catulo restitatur, tum Catulum damnato*; or thus: *Judex esto: Quod Aulus Agerius Numerio Negidium hominem vendidit; si paret Numerium Negidium Aulo Agerio sestertium X millia dare oportere, etc.*; or this: *Si paret (ope) consiliovi Dionis Servii filio furtum factum esse patræ aureæ, quam ob rem, pro fure damnum Dionem Servium decidere oportere, etc.* The following is a formula *in factum concepta*:—*Recuperatores sunt; si paret illum Patronum ab illo liberto contra edictum illius Prætoris in jus vocatum esse, Recuperatores illum libertum illi patrono sestertium X millia condemnato; si non paret, absolvunt.* There were cases in which the formula might be drawn in either way; for instance, in actions upon the contracts of deposit or commodate. For instance, the formula: *Judex esto; quod Aulus Agerius apud Numerium Negidium mensam argenteam deposuit, qua de re agitur, quidquid ob eam rem Numerium Negidium Aulo Agerio dare facere oportet ex fide bonâ ejus, id judex Numerium Negidium Aulo Agerio condemnato; si non paret, absolvito*, is one *in jus concepta*. On the other hand, the following is *in factum concepta*: *Judex esto; si paret, Aulum Agerium apud Numerium Negidium mensam argenteam deposuisse, eamque dolo malo Numerii Negidii Aulo Agerio redditam non esse, quanti ea res erit, tantam pecuniam judex Numerium Negidium Aulo Agerio condemnato; si non paret, absolvito.*

The analogy between the principles of pleading in the Roman law and those of the modern English practice, is too striking to have been overlooked by the few writers on English law who have had their attention turned to the Roman forms. This subject will be found discussed in the opening chapter of Starkie's Law of Evidence, and in the article 'Actio,' in Smith's Dictionary of Antiquities. On a superficial glance, the resemblance is only too apt to be exaggerated; and before drawing our own practical conclusions,

we shall try to avoid this danger by pointing out the main distinction between the principles of pleading in the Roman and in the modern English system. At first sight the *intentio* of the action, followed by the choice given to the *reus*, *inficiari aut excipere*, has a striking resemblance to the English declaration, followed by the choice between joining issue and a plea of confession and avoidance; and we believe, especially in the case of actions in *factum* conceptæ, the two processes must have led to a very similar conduct of the cause. The principle, however, upon which the *exceptio* was held to answer to the *intentio*, was not that of confession and avoidance. It would rather be analogous in English terminology to admitting the claim at law, but finding a defence to it in equity. Not that the relation between the *exceptio* and the *intentio* is in the least degree *equivalent* to that between equity and law as administered by the English courts. It is practically much more similar to the relation of the plea to the declaration. But to understand the principle of it, we must recur, in the history of the Roman law, to the relation between the legislation of the Prætor and the old civil law of Rome.

The process by which the strict civil law was modified by the legislation of the Prætor, has been so well and often described by recent authors, that it need not be dwelt on here. The meaning of the term *æquitas*, as applied by the classical jurists to this legislation, must be also assumed as familiar. The *exceptio* then, in its original sense, was a defence allowed by the edict of the Prætor to a claim which was, by the strict civil law, unexceptionable; or it is a defence allowed, in the language of Gaius, 'where one is bound by the civil law, but it would be *inequitable* that he should be condemned in judgment. For instance, if I have stipulated for repayment of a sum of money from you, as if about to pay it over to you in loan, but have not paid it over, it is certain that I have a good action against you for the money, for you are legally bound to pay it according to the stipulation; but because it is *inequitable* (*quia iniquum est*) that you should be condemned on that ground (*eo nomine*), it is held that you ought to be defended by the exception of *dolus malus* (*placet par exceptionem doli mali te defendi debere*).'. The principle, then, on which the *exceptio* is held to afford an answer to the *intentio*, is modelled upon the way in which the Prætor's edict modified the civil law; and could we reconstruct a set of forms of pleading employed in the Roman law, the basis of its several categories would be historically grounded in the relation of these con-

ficting systems, although it does not follow that every *intentio* and *exceptio* belong respectively to the civil and Prætorian law. The principle was extended by a very simple analogy. ‘*Interdum evenit ut exceptio, quæ primâ facie justa videatur, inique noceat actori; quod cum accidat, aliâ adjectione opus est adjuvandi actoris gratiâ; quæ adjectio replicatio vocatur.*’ Thus the principle is extended to a reply against the exception itself, where its strict application would be *inequitable*. The principle will of course apply *à fortiori* to the case of an *intentio*, which itself arises from the Prætorian edict, but which admits of an *equitable* defence. In short, the conception of *equity*, which originally belongs to the Prætorian legislation as contrasted with the civil law, has received an extended interpretation, which, taken in connection with the actual history and state of the law, is not wanting in definiteness and precision, but whose complete definition and comprehension would involve a restoration of the entire categories of actions, exceptions, replications, etc., with which Roman practitioners were actually conversant. A restoration such as we are now hinting at would be a task not so impracticable as at first sight appears, though it is one not likely to be undertaken or achieved at the present day. The form which legal principles assume in the writings of the great Roman jurists, is seldom without relation to the form in which they might be expressed when embodied in an *intentio* or an *exceptio*; and to this cause perhaps is due some of that extreme precision and conciseness with which in their writings we find legal principles expressed. Were the subject approached by a person who, to the industry of the old commentators, combined a practical acquaintance with the working of modern legal processes, the reconstruction of Roman styles of pleading from the other materials of the *Corpus Juris* would be by no means a visionary scheme. Such a work, if achieved, would form a key to the comprehension of their law as a practical system far better than any we possess at present.

But without proposing to ourselves so large a task, let us see whether some practical lessons may not be gathered from the style of the Roman pleading, that will lead us towards the mark we have already indicated. *Every pleading in Roman law stated in a single and distinct proposition a ground of action or a ground of defence.* There were certain well-known legal conclusions, which might be embodied in the same proposition, along with the facts forming the

ground of action. This was the case where the formula was *in jus concepta*. When the legal conclusion did not belong to one of those well-known classes, the ground of action was stated by itself as a simple proposition *in fact*. This was the case when the formula was in *factum concepta*. Now, had the phrase *ground of action* been known to the Roman law, in the sense in which we have just used it, it would have been a phrase perfectly without ambiguity. Every clause of the Prætor's edict would combine to define it; every principle laid down by the institutional writers would give point to it; every oration of Cicero would assist in clearing our conception of it. Every sentence of these authorities was no less a lesson in pleading than in the principles of law. Why? Because the grounds of action or defence employed in a pleading, and the principles of law pervading the *corpus juris*, derive their form identically from the same main source—the Edict of the Prætor. A similar harmony between the forms of pleading, and of the principles laid down in text-books and decisions, may, though to a less perfect degree, be observed in the law of England. Why? Because the question is by the pleaders themselves brought to a point which no obtuseness on the part of the bench could entirely round off. Much of the diffuseness of our own reported decisions of late years arises from the utter want of precision in the papers before the Court. It is only because some of our judges possess a rare *faculty* of *divining* the point at issue; that the decisions often possess a clearness which is wanting in the record.

The question then remains, Are there in our own law sufficient materials for defining what we mean by the grounds of an action or of a defence, and for the institution of a method of pleading in which they shall be stated with clearness and precision, and in harmony with the principles of our law. We are inclined to think that there are such materials, and that they are to be found in the form of legal principles, as laid down by our institutional writers, in the forms of issues, which, in conformity with those principles, have been elaborated with the aid of the Court by the practice of nearly fifty years; and in the conception of the term *grounds* of action, as now understood by our best and most practised lawyers. To inaugurate a scientific and accurate system of pleading, there is only wanted a connecting link between the clear and well-defined principles of our law, and the forms of our practice. This might be supplied by a carefully prepared schedule, having the authority of

the Legislature, which might afford a model for our pleadings as completely and as successfully as the schedule to the Common Law Procedure Act in England; and might, if framed with sufficient skill, bear to both our legal principles and forms of pleading a relation similar to that which was held by the Prætor's edict in the Roman law. The materials available for the preparation of such a schedule are those which we have just indicated.

We have lately heard it observed by the highest authority of our bench, that counsel appear to be careless in the framing of issues, perhaps thinking that they do not require much trouble because they are short. We are rather inclined to think that the carelessness arises, just as the looseness of our records themselves, from the fact that no important consequences attach to such carelessness. If practitioners were obliged to embody in a single proposition their condescendence, their issue, and their record, we feel sure that the profession would not be found wanting in the skill and care adequate to that requirement. The responsibility is now left to the Court of picking out, if they can, a ground of action from the heterogeneous mass of averments scattered over the record. This is inverting altogether the proper duties of the bench. It is the proper duty of *counsel* to sift from his client's information the true ground of action, the legal wrong for which remedy is to be sought. And that he shall be made to do this with certainty and despatch, the only security is the knowledge that his client's case must stand or fall with the ground on which he elects to place it. It is not creditable to our law or our profession, that a *condescendence* should be the paradise of lawyers' clerks, and the amazement of Law Peers. It is not creditable, that while our legal principles still retain in some measure the precision of those of the great Roman jurists, our pleadings should degenerate to mere platform rhetoric. And if our legal system is to retain the symmetry and precision which is the glory of our great institutional writers, such a result can only be permanently secured if the form of our pleadings is brought into some kind of harmony with the substance of our established legal principles.

ON THE CODIFICATION OF MERCANTILE LAW.

In a very interesting and instructive address lately delivered in Edinburgh, on the invitation of the President of the Chamber of Commerce, Professor Muirhead has directed the attention of the

trading community to the inconvenience resulting from the prevalence of distinct systems of mercantile law in this country, and to the expediency of correcting this anomaly by the enactment of a mercantile code, which should be made immediately applicable to the whole United Kingdom, and the adoption of which should be recommended to the various Colonial Legislatures. The learned Professor introduced the subject by some judicious observations, in which he contrasted the great advances which have been made in the various branches of physical and natural science, with the comparatively slow progression of jurisprudence, and showed by a brief survey of what had been accomplished by Continental and American jurists, that this country, notwithstanding the power which it possesses of bringing an enlightened public opinion to bear upon the action of the Legislature, is very far from being on a level with the great European and American States as respects the simplification and perfection of its laws. We must confess that the criticism is only too well deserved. It is true, that in the matter of fiscal legislation, and the liberation of industry from the trammels of the protective system, we have set a noble example to other communities—an example which they have not been slow to follow, with evident advantage to their own commerce as well as to ours. But the precedence which we may justly claim in the walk of economical jurisprudence, ought not to tempt us to shut our eyes to our inferiority in the region of private law; and as the laws affecting trade and finance are now generally believed to be established on a sound and enduring basis, it is time that our legislators should turn their attention to other laws in which the whole community are equally interested, and which affect the daily transactions of society.

Mr Muirhead, with a just perception of the affinities of the two questions, has proposed to deal with the codification and the assimilation of the laws of the United Kingdom as aspects of one and the same subject. For practical purposes they are the same,—the same with respect to the measure in which improvement is practicable, and inseparable for all purposes of utility. For it is precisely in those departments of the law which admit of assimilation, that advantage may be gained by incorporating known principles in a code. Separate codes for the three kingdoms, comprehending those parts of their laws which, in the meantime, are incapable of assimilation, would be of no practical value; or rather they must be regarded as positively injurious, because standing in the way of that

progressive assimilation which time and the interchange of opinions and customs is continually tending to accomplish. Separate codification of those parts of the law in which assimilation is practicable, would be to a great extent labour thrown away. A purely Scotch code could only be useful to Scotch legal practitioners. What mercantile men want, is a uniform code of laws to regulate the ordinary transactions of business, and to relieve them from the uncertainty which pertains to the construction of contracts between parties resident in different parts of the kingdom, in which distinct systems of law are in operation.

With respect to a large, probably the largest proportion of the cases which occupy the attention of courts of law,—we mean those depending on the construction of written obligations,—positive law, whether collected in a code or dispersed throughout the statute book, can have but a very limited application. Law may define the meaning and effect of ordinary contracts in their simplest or most usual forms, and may prescribe abridged formulas or styles bearing a definite meaning; but in the bulk of the cases upon special contracts, the law which binds the parties is that which they have made for themselves, and by which they have agreed to be bound. This observation is, of course, equally applicable to cases arising upon voluntary settlements, in which the intention of the maker is the governing rule of interpretation. In so far, therefore, as the interpretation of such instruments may be facilitated by the enactment of arbitrary laws, it is of little consequence whether the rules of construction are incorporated in a code or embodied in separate statutes.

For the purpose of determining the proper sphere of the principle of codification, a rough division of the law of private rights may be made into heads of classification: (1.) Personal Contracts and Securities; (2.) Contracts and Securities affecting Land; (3.) Succession, Relationship (upon which rights of succession depend), and Guardianship. Succession by will or voluntary deed, although not necessarily dependent upon relationship, is usually so; and in so far as it is susceptible of regulation by enactment, may be regarded as belonging to the same category of rights. (4.) Enforcement of Rights by legal remedies, including Actions, Legal Diligence, and the Administration of Property under judicial supervision. We think that the attention of those who are interested in the assimilation and consolidation of the laws of the United Kingdom should,

in the meantime, be confined to the first of these classes, which is equivalent with, or at least includes, what is popularly termed 'Mercantile Law.' The existing diversity of land tenures, and the interference with patrimonial interests involved in the assimilating of these tenures, render progress in that direction impracticable in any other way than that of partial legislative efforts. The subject of succession and status could not be touched without encountering opposition from national prejudices. Lord Rutherford's Entail Acts, and the Moveable Succession Acts, have already removed some of the most material elements of divergence between the succession laws of England and Scotland; and the Confirmation and Probate Acts have in one important particular established an actual uniformity in the administration of executry estates. The peculiarities of our marriage law remain in the meantime as an obstacle to united action in this very important branch of private jurisprudence.

The subject being thus narrowed to the consideration of the law of personal contracts, it is to be observed that the differences which present themselves, on a comparison of the laws of England and Scotland, are in a great measure differences of form and detail, which are beyond the reach of special legislative remedy. This is proved by the result of the attempt which was made to revise them a few years ago. A Royal Commission was appointed for the express purpose of reporting upon these differences, with a view to their removal. The Commissioners, it is well known, discharged their duty most ably and conscientiously. Their report set forth the various differences in point of principle which were found to exist, and suggested the appropriate remedy; and their recommendations were carried into effect by two Acts of Parliament, passed in 1856, one of them altering the law of England, so as to bring it into conformity with that of Scotland, the other effecting corresponding changes in our own law. Still it is perfectly well known that the interpretation of the law, as applicable to mercantile contracts, has not been uniform. Points are decided one way in Westminster Hall, and another way in the Parliament House; and this conflict of opinion, resulting in a conflict of laws, is irremediable while the laws of the two countries are in theory distinct, and are administered by courts of law whose decisions are not reciprocally binding and authoritative. To attempt to remove such differences of interpretation by successive legislation were a hopeless task; and even if it could be accomplished, the success

would be but temporary; because the causes of divergence would remain,—these causes being the non-existence of a common standard of opinion to which the courts of both countries must conform, and the existence of two distinct standards, not the less real because undefined,—namely, the ‘common law’ of the two divisions of the kingdom. ‘Common law’ will continue to hold its ground until supplanted by a code; and with it, diversity of interpretation, and that ‘glorious uncertainty’ which no less radical amendment than that of a code will be able to remove.

The advantages of a code in relation to mercantile law are indeed so obvious, that opposition to the proposition on its merits is not to be apprehended. In professional circles, however, the opinion is very prevalent, that the object proposed is impracticable. Difficulties are anticipated in the adjustment of the terms of the measure; difficulties in limiting the subjects which are to be included in it; difficulties in finding men possessed of the requisite acquirements. To all these objections one satisfactory answer may be returned: Codification has actually been accomplished in other states, and on a much more extended scale than is now proposed. Without going back to the time of Justinian, it may suffice to instance the French Code, which was destined to replace a system of laws similar to our own, but, in so far as respects the tenures of land, greatly more complex and more technical. Yet the commissioners entrusted with the preparation of the French Code had their measure in draft within *four* months from their appointment; and their measure has not only met with entire acceptance from the non-legal class in France, but has been adopted, with slight modifications, by many of the leading states of the Continent. Notwithstanding the haste with which this, the greatest of modern codes, was prepared, its provisions have proved eminently satisfactory; and the Code Napoleon, as it is now called, has been adopted by many of the continental states, whose systems of common law were more or less dissimilar to that of France. We are indebted to Mr Muirhead’s address for the information that the existing commercial code of Germany was the product of a deliberate and detailed discussion by a congress of representatives of the various Germanic states who adopted it. It is commonly supposed that a perfect code must necessarily emanate from a despotic Government, and that the discussion which such a measure must receive from a parliamentary assembly would be fatal to its integrity. The example of Germany

is valuable, as showing that a code may survive discussion, if only sufficient time be given for full deliberation, and the consideration of the amendments that may be successively made upon it. Too much weight, we think, is given to the objection, that our complicated transactions require a complicated system of law for their evolution, and that this requirement is best met by what is called an elastic system, in which the judges are allowed to provide for new cases by new principles, or new applications of established principles. A little consideration will show that, as matters stand, the judges have really very little discretion. The text-books and the reported decisions must be conformed to ; and the judges, always professedly endowed with a discretionary jurisdiction, are fast bound in a network of precedents, the strength of which is only perceived when an effort is made to break through them. We do not think that, in the present matured state of the principles of mercantile jurisprudence, a code would be found to be in any degree more inimical to the expansion of these principles than the received text-books and precedents.

The assumption is entirely fallacious, that an extensive commerce and highly artificial transactions necessitate a very bulky or complex code. Transactions may be complex, and may, nevertheless, be subject to the operation of rules and principles of no high degree of complexity. In this respect, an analogy may be perceived between the growth of language and that of laws. Passing from the rudimentary stage, from which nothing of value is to be learned, we find in the earliest conditions of a fully formed language great variety of forms and inflexions, great irregularities of structure and combination; each word and each phrase apparently obeying a law of its own, which can only be correlated to other laws of the same species by way of analogy. As a language becomes more extensively used, it gradually drops its irregularities and its artificial combinations, and assumes that simple and apparently inartificial form, which is itself the ultimate result of art. So it has been, and ought to be, with laws. If we trace back the various modern systems to their origin in the dark ages, we shall find, first, a system of personal laws, varying with the individual who was subject to them : next, local laws,—each province, and sometimes each estate, having its own peculiar tenures ; each craft having its peculiar usages, called ‘ custom of trade,’ which were held by the legists to be implied in mercantile contracts, though not expressed in them. The efforts of law reformers in recent times have been chiefly valuable where they have been

directed towards the abolition of what is technical, exceptional, and customary, whether in the law of real property or in the law of contracts. With respect to the former they have only been partially successful; and until uniformity of laws shall have been established by a gradual process of assimilation, it is not desirable that we should attempt to codify. With respect to mercantile contracts, it may safely be asserted that our law is more simple now than it was half a century ago, and that great advantages would result from its further simplification.

This brings us to the consideration of the last of the objections which are sometimes urged against codification, which is, that we are not yet ripe for such a change. Now it is admitted on all hands, that codification is the ultimate form which the municipal law of any country ought to assume; and that, before giving permanence to the framework of our laws, we ought to have some reasonable assurance that they have already approached nearly to that form which they are destined to receive. But the ultimate forms which the laws of any country may be expected to assume, must be one and the same. A fair test of approximation to this ultimate form may therefore be found in the degree of convergence of two systems originally distinct, and both admittedly undergoing progressive improvement. Such a test we have in a comparison of the mercantile laws of England and Scotland. Originally dissimilar in many essential particulars, they had, under a system of liberal judicial interpretation, aided by the observations of enlightened commentators, approached so near, that it was thought fitting not many years ago to cut away by enactment those outstanding differences which were too strongly rooted in principle to be capable of removal in any other manner. This result indicates the arrival of both systems at a stage of development in which no material change is probable or desirable, and where nothing is wanting but the crowning labours of the consolidators to give consistency, regularity, and permanence to the structure.

We have on a former occasion expressed our cordial approbation of the expurgatory labours of the Lord Chancellor upon the statute-book. Expurgation of statutes, however, does not carry us very far on the way to the desired object; and as to expurgation of 1400 volumes of decisions, the labour is infinitely greater than that required for the preparation of a code. If we are to wait for a re-

issue of the English Reports, under Parliamentary authority, before we can be allowed to approach the business of codification, we fear that that business is not likely to be inaugurated by any of the lawyers of the present generation. We see no necessity for waiting the accomplishment of so tremendous an undertaking; and we would respectfully suggest that the time has come when the question of codification of the mercantile laws of the United Kingdom ought to be seriously considered; and that as the best means of ensuring fair and full consideration, a Royal Commission ought to be appointed, with power, if they think it practicable, to undertake the preparation of the draft of a mercantile code, for consideration by the Legislature.

Since this notice was written, we have learned, with much pleasure, that Professor Muirhead's lecture is being printed, with a view to having it circulated among the Chambers of Commerce of the United Kingdom, and other bodies interested in the question of codification. The following extract will enable our readers to judge of the author's mode of treating this very interesting question:—

‘But though the time has not yet arrived for the complete assimilation of the laws of the United Kingdom, and the preparation and introduction of a *general* code of private law applicable alike to England, Scotland, and Ireland, yet it is surely worth our while, in anticipation of the time—I hope not very far distant—when those most desirable objects may be safely attained, to pave the way for them by preparatory measures. Think you the labours of the First Napoleon to codify the law of France would have resulted so gloriously to himself and his country, if no forerunner had helped to clear his path? I trow not. Had not Colbert under Louis XIV., and D’Agnesseau under Louis XV., thrown their wonderful energies into that series of ordinances which conferred so great a celebrity on the legislation of the latter half of the seventeenth and the first half of the eighteenth centuries,—had not the National Assembly, in the last days of the monarchy, accomplished the overthrow of feudalism, effected the separation of the spiritual and the temporal, taken from the communes their charters, and the provinces their privileges, and remodelled the whole judicial organization of the country,—had not these things been previously accomplished, the codification of the Consulate and the Empire would have been, I will not say impossible, but, in all human probability, far less successful and efficient.

‘Every scheme of general codification, so far as I know, that has been brought to a successful and praiseworthy issue, has been preceded by preparatory measures of more or less importance. In England, in contemplation of the eventual preparation of a code, a commission has for some years been engaged upon the expurgation of the statute-book. Their object is to weed out all that is obsolete and repealed, and present us with a collection of so much only of the statute-law as is in actual observance at this moment. This being accomplished, another process is to be performed: the enactments spread through the revised statute-book are to be systematically classified according to their subject-matter, and the different portions arranged under appropriate heads, so as to present an accurate and methodical analysis of the law comprised under each. The Lord Chancellor proposes that a similar commission shall be appointed to operate in the same way upon the case-law,—the ten or eleven hundred volumes of reports I have already mentioned. The same order of procedure will be followed; first, they will be weeded and curtailed, then they will be methodically classified upon the same system as that adopted by the Statute Law Commission. The result will be the production of an accurate picture—still, however, on an enormous scale—of the law of England as it is, with all its excellences, all its deformities, but free from any intermixture of what once was law, but now is not. Both of these herculean labours,—that on the statute-book and that on the case-books,—I believe to be absolutely necessary preparatives to any attempt to codify generally the law of England. The law of Scotland being contained within smaller bounds, the necessity for its expurgatory revision is not in some respects so clamant; yet it is indispensable if we are to have a general code for the United Kingdom, based to any extent on a comparison of the laws peculiar to its three divisions respectively. The Lord Advocate has already distinguished his official career by many wise and beneficent legislative efforts. By doing for Scotland what Lord Westbury is doing for England, I venture to think he will add yet greater lustre to his name, and earn for himself the lasting gratitude of all who wish to see a common law in a common country.

‘But while it would be premature at present to attempt a *general* codification of the private law of these kingdoms, I see no good reason to prevent *partial* codification. It is by no means necessary that *all* codification should be postponed, because some branches

of the law are not yet in a condition to be operated on. Long before France had her general code of private law,—her Code Napoleon, as it is now once more styled,—she had *several* partial codes of more or less value. Among these it may be sufficient to name the Commercial Ordinance of 1673, long known as the Code Savary, from the name of one of its most distinguished framers, and the Maritime Ordinance of 1681, which had the honour of being adopted by most nations of Europe as their common sea law. At this day, many States, both of Europe and America, that have no complete codes, have yet partial ones, in the shape of penal and mercantile ordinances.'

New Books.

The Ocean, the River, and the Shore. Part I.—Navigation. By J. WILLCOCK, Q.C., and A. WILLCOCK, M.A., Barrister. London: Routledge, Warne, and Routledge. 1863.

A Treatise on the Fishery Laws of the United Kingdom, including the Laws of Angling. By JAMES PATERSON, Esq., M.A., of the Middle Temple, Barrister-at-Law. London and Cambridge: Macmillan and Co. 1863.

THOSE who complain that law is a dry study, and that its literature is one of the most thorny bits of the field of letters, will perhaps modify their opinion by looking into the first of the works above mentioned. Gilbert A'Beckett did something to enliven the subject, but he was a mere joker. The Messrs Willcock are in earnest, and mean no fun, any more than did Tribonian, Menoo, or our own illustrious Stair. And yet, for ourselves, we have derived but feeble recreation from the pages of *Punch* for some time back, compared with what we owe to this sublime pair of barristers.

We are not afraid to say, even at the risk of being quoted among 'favourable notices,' that the joint product of their learning and eloquence is a very remarkable, nay, a wonderful book. A tolerable acquaintance with the Advocates' Library enables us to say with some confidence, that it stands alone in that vast repository of literature. Its fellow reposes not on any shelf there, and the Messrs Willcock are in the proud position of requiring a special niche

for their two selves in the Pantheon of law. Looking at it externally, its bright green boards and sensational title led us to conclude that the librarian had made a ridiculous mistake in placing it in the Law Library, instead of that pleasant department where the young devourer of light literature finds such works as 'The Shoe and the Canoe,' and 'The Creel and the Cuddy,' to regale his gentle mind. The word 'Navigation' on the back and title-page, and the names of a Q.C. and barrister, afforded some explanation of the incongruity. But even after an inspection of the interior, we are bound to say that this singular work is in quite uncongenial company—in fact, a fish out of water—on the same shelves with Grotius and Puffendorf. It must have a shelf to itself in a new department of the library—a department no doubt called for by the spirit of the age, and to be named 'Sensation Law-Literature.'

The book, we are told, is intended 'rather for the merchant, the mariner, the riparian proprietor, the fisherman, the jurist, and the general reader, than for the lawyer,' though it is modestly hoped that the latter variety of the human species 'will not find it useless.' Whether the merchant, the mariner, and the rest will find it useless, we dare not say, one man's meat being sometimes another man's poison. To what extent the lawyer will so find it, may, however, be judged from the announcement that 'the object of the authors is to show what is law, rather than what has been enunciated and accepted as law.' When we add to this, that it lacks that without which no book intended for use and reference can be tolerated—an index—it must be apparent that the Messrs Willcock have been quite above any regard for mere technical benefit. The object of this remarkable Q.C. and barrister is, in fact, a lofty one; and the mode of its execution, if not quite consonant with the ideas of a lawyer or a man of sense, is at least novel, and well calculated to inspire some measure of awe and admiration in the minds of the mariner and the fisherman. Discarding altogether the hackneyed and old-fogyish idea that a book intended to convey information on law ought to be severely relevant in matter and unadorned in style, the Messrs Willcock write more after the manner of Oriental prophets or Celtic bards than of prosaic, matter-of-fact Englishmen wearing wigs and silk gowns. There is, no doubt, a considerable mass of information, historical and legal, conveyed in their pages, and the authors even condescend to quote Acts of Parliament and authorities, and occasionally to talk coherently. But they are in their glory and

congenial element when they give full swing to their inspiration, and picture the wonders and terrors of the deep, the horrors of war, the grand scenes of past history, or with indignant fervour lay down from their high eminence 'what is law,' instead of what pedants and pettifoggers 'have enunciated and accepted as law.' Our readers would hardly believe us if we told them, without proof, that we have been, in reading this book, strangely reminded at one time of Ossian's Poems, at another of the Minor Prophets or the Koran, and not seldom of such masters of the abrupt and tragic style as Mr G. M. W. Reynolds. It is, in short, as we said at the outset, a truly remarkable work; and that it should be the production of a couple of English barristers, one of them (Heaven knows how!) a Q.C., is one of the most singular phenomenon we have heard of since the days of Balaam.

It is, we are alarmed to observe, the *first* part of a complete system of law (or prophecy) on this great subject. The present part is entitled 'Navigation,' and is meant apparently to exhaust the ocean. The river and the shore will next claim attention, and on them we are threatened with no less than three more parts, viz., II. Fishing and Fowling; III. The Use of Water; IV. The Shore and Subaqueous Land. The prospect is exciting, but awful. The riparian proprietor and the fisherman may anticipate some magnificent musings on punts and poaching, kelts and garvies, with introductory rambles to the sources of the Nile and Amazon; while the merchant and the mariner will enjoy a historic voyage round the coasts of the globe, from the Temple Stairs to Tongataboo. Part III. will perhaps be the grandest of all, as it appears to present an unlimited field of criticism and speculation to the soaring muse of the Messrs Willcock. Pindar will be invoked, and we shall have pictures of life from the times when Abraham's herdsmen contended with those of Lot, down to the latest struggle of rival millowners on the banks of the Kelvin.

In this volume we have a general introduction, containing, among other important propositions duly ranged in paragraphs (of which the book contains 1799), the interesting information that the surface of the globe is divisible into two portions, of which 'the first is land, and the second is water.' As early as the second page, the authors assume the poetic mantle, and thus discourse for the benefit of 'the merchant, the riparian proprietor, the fisherman, the jurist, and the general reader.' They have described in quite Virgilian

strains what man can do to the land, and they straightway take to the water thus :—

'7. Not so the water: nature gave it to be free, to sport with the tempest and to thunder upon the shore; to gush from its fountains, enamelled with verdure and flowers; to flow through the valley, suffusing it with beauty, and spreading fertility as it flows. Nature gave it for the habitation of inmates as free and wild as its wave. Nature gave it for the use of man, but limited his dominion and his right to actual enjoyment and use. Man may vary the lines of its smaller features. He can well up the little springs, he can embank and sometimes alter the direction of the tiny streams; he can raise a mill at the side of the river, and even thrust it, but not far, amid the refractory breakers. Water will impose its own law: man can no more resist its mandates than he can repel its waves; he can check, and does check, each a little; and he strives, but strives in vain, to subjugate the margin and the ordinances of the sea. Water flows, and will flow, and its inmates will be free. Man detains a little in a pond, and triumphantly says, "This at least is mine." But even that vanishes in vapour, or steals away to the stream. To restore his petty property, he must supplicate the fountain or the rain. He plants on the coast a bed of oysters, and gathers together and tries to domesticate their spat. The villain molluscs attach themselves to the soil. He says, "I can measure them by the yard, I can mete them out by the bushel; surely these are mine!" But behold Leviathan, "will he make supplications unto thee? will he flatter thee? will he make a covenant with thee? wilt thou take him for a servant for ever?" Wilt thou imprison the royal salmon cased in glowing steel, the gold-suffused vermilion-spotted trout, the graceful grayling in his silvery sheath? They will suspect thy stratagem, and struggle to evade thy skill; though captured, they are unsubdued—they will keep no parol with thee; check their freedom, restrict their wanderings, their gorgeous vestments fade—they pine, they die, they cannot live as slaves.'

Said we not well that this is a remarkable book, and its authors wonderful men, considering that the one is a Q.C. and the other a barrister, both presumably Anglo-Saxons; their subject 'Navigation,' and their object 'to show what is law!' The above, it will be seen, is in the Oriental style; and we regret to say that writers owing such manifest obligations to the Hebrew Scriptures, seem a little ungrateful to the great race from whom we have received them. Thus, while in their historical sketch they praise the Phœnicians and other heathens greatly, they speak of the children of Israel as a half-savage horde, cruelly exterminating a people more disciplined and civilised than themselves; having a notion somewhat more distinct than their neighbours of a single God, but only as a tutelar national deity, and a notion 'disturbed also by vague associations of angels, spirits, and ghosts.' The commerce of the Hebrews is this briefly and disdainfully noticed :—

'In the reigns of the priestridden David and his pedantic and luxurious son, they imported some peacocks, some apes, and some gold!'

And the Babylonish captivity is curtly disposed of in a strain of undisguised satisfaction :—

'245. Thou too art smitten, insulting Salem (B.C. 587); thy children weep beside the waters of Babylon; the flames have devoured thy shrine.'

Apart from any theological prejudices, we think it rather too bad, that men of such poetic and prophetic genius as the Messrs Willcock, should have so little respect for the sweet singer of Israel and his great son, and so small sympathy with the captives who wept at the remembrance of Zion. Who knows but they may have had experience in the way of transactions with their modern descendants, which may have warped and embittered their otherwise fine feelings?

This historic sketch is very comprehensive, beginning with the dawn of navigation, 2800 years before the Christian era. Strange to say, there is no mention of Noah; whom perhaps the authors consider a drunken old fellow, and unworthy of mention, as a skipper of selfish necessity rather than of genuine enterprise. There is, however, enough and to spare about the Chinese and the Sabæans, the Egyptians, the Phœnicians, the Rhodians, the Colchians, and, in fact, every nation under the sun that has ever been known to have manned a ship or sold a cargo. Each has one or more paragraphs devoted to itself, containing a few facts, borrowed from Macpherson's *Annals of Commerce*, with occasional original utterances of the kind given above. The sketch does not extend beyond the reign of Elizabeth, and draws to an epic close with a description of the Armada and its ruin, in this truly Fingalian style:—

'553. The invincible Armada approaches. Darkness closes on the scene. A thousand beacons are blazing along the English hills. Forth sail the royal ships of England. Their numbers are few. A noble is their admiral, but the Corsairs are their captains, the terrible sons of the sea. Forth speed the rovers of Plymouth; forth speed the gallants of Fowey, the cockboats, the shallops, all the merchant craft; the nobles and the gentry are among the sailors, undisciplined volunteers. The eagles and the hawks are on the banquet; they have snuffed the carnage of Spain. They who have not already won them, this day shall win their spurs!'

The winning of spurs by sailors naturally suggest the Horse Marines.

After this scenic unfolding of the world's map for a few thousand years, the authors address themselves to business, and proceed to 'the laws which regulate the waters.' Byron is at once pressed into the service; and we are informed from the 'Corsair,' regarding a ship, that

'She walks the waters like a thing of life,
And seems to dare the elements to strife.'

In justice to the authors, we must, however, acknowledge that they also tell us about the treaties of Vienna and of Paris, and other important fountains of maritime law, from which extracts are given. And so they proceed with chapters on the conduct of ships and their owners; wreck and salvage, slave-trade, smuggling, the laws of war, neutrals, prize courts, etc., etc.,—all more or less useful and rational, when the authors choose to doff the prophetic mantle, and resume the appropriate costume and speech of the English bar. Seriously speaking, there is less of this stupendous nonsense in these chapters; but still far too much to save the authors from the charge of having degraded a great subject, so far as that was in their power, by pandering to the popular taste for the startling and florid, and indulging their own weakness for ‘fine writing.’ Had they avoided these temptations, they might have produced a good and really interesting book; as it is, they have produced a work that will be a wonder and a laughing-stock to those who ever may light on it in the course of research on questions of maritime law. But probably they have done the kind of thing they aimed at, and will have their reward.

It is hardly fair to Mr Paterson to place his useful and ‘wiselike’ little book in juxtaposition with such a medley of law and absurdity as the work we have been noticing. But we hope he will not consider that any indignity is meant in giving the *pas* to a Q.C. before a mere barrister. Mr Paterson is already well known as an author of solid merit, and this short but comprehensive treatise on the fishery laws of the United Kingdom will not derogate from his reputation. It contains within a moderate compass a digest of all that is of most practical importance in this branch of law; and is justified as an addition to legal literature both by the lack of any similar treatise, and by the workmanlike mode in which that want has been supplied.

Correspondence.

CORRESPONDENCE BETWEEN ROBERT ROBERTSON, ESQ., ONE OF THE
SHERIFFS-SUBSTITUTE OF STIRLINGSHIRE, AND THE EDITOR OF THE
'JOURNAL OF JURISPRUDENCE.'

WE do not think it necessary to make any observations upon the subjoined letters which Sheriff Robertson has thought fit to address to us, with reference to the criticisms upon his pamphlet which appeared in the December and January numbers of this Journal, further than to refer to the articles themselves in refutation of the absurd charges which the Sheriff has founded upon them. It is due to our readers, however, that we should state our reasons for bringing the correspondence under their notice. It will be observed from our reply, that we had at first intended to decline giving publicity to Mr Robertson's complaints, in consequence of the terms in which they were expressed. But the threat implied in the concluding sentence of his second letter has induced us to publish it, as an act of justice towards ourselves, and of fair retribution towards Mr Robertson; and this again necessitated the publication of the entire correspondence. Mr Robertson has asked for satisfaction, and has now got it. We hope the publicity we have given to his wrongs may enable him to obtain the consolation which a sympathizing public can afford to an injured and unappreciated Sheriff-Substitute.

We subjoin a letter which we have been requested to insert by the author of the articles in reply to Mr Robertson's attack upon him in his second pamphlet. The answer to Mr Robertson's charges is complete and crushing; not the less so that it is expressed in terms studiously moderate, considering the unexampled provocation which the author has received.

No. 1.

TRININALLAN HOUSE, STIRLING, 16th Feb. 1864.

SIR,—I send you this evening (by book post) a pamphlet containing my second letter to Mr Stirling of Keir, considerably enlarged, and some 'additional observations' with special reference to the intermediate appeal, residence of the Sheriffs within their counties, etc. My reason for forwarding you this—almost before it is published—is to afford the author of the three articles on the Sheriff Courts, in your December, January, and February numbers, another opportunity of retracting (in your March number) or explaining the untruthful statements which he has made in regard to me. He had ample time to do so before your February number was issued; but instead of doing so, the article for that month, and especially the concluding note, was a mere continuation of the same flippant scurrility which has characterized the whole of this person's effusions. I would ask you especially to direct his attention, and your own, to pp. 25, 26, 27, *et seq.*, of my letter.

To yourself I would only venture to suggest, that untruthful statements and personal abuse, more especially persisted in after the fullest

explanations have been given by the party assailed, are not the likeliest means for promoting the increased circulation of a Law Journal.—I am, etc.,

(Signed) ROBT. ROBERTSON,
Sheriff-substitute of Stirlingshire.

To the Editor of the *Journal of Jurisprudence*.

No. 2.

ADVOCATES' LIBRARY, EDINBURGH, 18th Feb. 1864.

SIR,—Your letter of the 16th instant, and accompanying pamphlet, addressed to the Editor of the *Journal of Jurisprudence*, have been forwarded by Messrs Clark to me, as the person having the principal charge of the literary department of the *Journal*.

I decline to comply with the requisition contained in your letter. I will neither retract a single sentence of any one of the articles of which you complain, nor will I be the medium of communicating your desire to the author of these articles. Nor is it necessary, considering the terms of your letter to me, that I should give any reasons for declining to enter into a personal correspondence.

Messrs Clark will insert any letter which you may wish to send for publication in the *Journal*, in explanation of your pamphlet, or in reply to the criticisms upon it; but they will not allow the pages of the *Journal* to be made a vehicle for personal attacks upon their contributors.

You are at liberty to publish this letter along with that to which it is a reply, if you should think proper to do so.—I have, etc.,

(Signed) JOHN M'LAREN.

Mr Sheriff Robertson, Stirling.

(The following letter crossed the above.)

No. 3.

TRININALLAN HOUSE, STIRLING, 17th Feb. 1864.

SIR,—I beg to enclose a 'note,' which will form the last page of the pamphlet sent to you yesterday (which will be published on Friday or Saturday), that, as far as I am concerned, you may have everything before you, in time for the publication of your number for March.

I may also take this opportunity of again directing your attention to the letter I addressed to you yesterday, in reference to *retraction, explanation, or apology*, as regards the grave charge made against me in your *Journal*. I have been there held up to the public as making, *for my own selfish objects*, 'a statement directly the reverse of truth,' *in the full knowledge that it was untrue.** For that, and no other, is the direct meaning of the reference to Lord Handyside.

I need not tell you that this is a charge of the most serious kind, affecting my judicial *honor* and *integrity*. No more serious charge could be made

* The reader will observe that the words in *italics* are Mr Robertson's, not ours. No such charge has been made by us; and the expression which is quoted, but not quite accurately, had reference to a matter of opinion, as to which we were quite entitled to contradict Mr Robertson, and to maintain our own view.

against a person in my position. I therefore ask the fullest explanation or apology, and this to be as widely circulated as the calumny. I will not allow this matter to be *shirked*, as it was in the February number. Before returning me an answer on this matter, it may be advisable for you to take your *publishers* into your counsels.—I am, etc.

(Signed) ROBT. ROBERTSON.

The Editor of the *Journal of Jurisprudence*.

No. 4.

EDINBURGH, 18th February 1864.

SIR,—In reply to your letter of 17th instant, I have to refer you to my answer to your previous communication, and to decline farther correspondence.—I am, etc.

(Signed) JOHN M'LAREN.

Mr Sheriff Robertson, Stirling.

LETTER FROM THE AUTHOR OF THE ARTICLES ON THE SHERIFF COURTS TO THE EDITOR, IN REPLY TO MR ROBERTSON'S CHARGES, CONTAINED IN HIS SECOND LETTER TO MR STIRLING OF KEIR.

SIR,—Mr Robert Robertson has addressed a second letter to Mr Stirling, in which he assails, with even more than his accustomed violence, the writer who has dared to criticise him in the *Journal of Jurisprudence*. I do not propose to reiterate arguments in order to convince those who will not be convinced; but as Mr Robertson has brought accusations against me, which, if true, would detract from the character of the *Journal* to which I have the honour to be a contributor, I must ask you to allow me a few words in reply.

I. I am accused of having grossly misrepresented Mr Robertson: *First*, in having represented him as maintaining that the Sheriff is not an immediate deputy of the Crown. I certainly thought that this position was to be inferred from the language of Mr Robertson's first letter, and I think so still. But he has himself put it beyond the region of inference. In the article in the *Stirling Observer* of 10th December 1863, which Mr Robertson (as I have before mentioned) adopted, added to, and circulated, in such a way as to justify the inference that he was the writer of it, or, at least, to make himself responsible for the contents thereof, the Sheriff is denied the position or title of 'a Royal Deputy' in the most express terms, and *twice* over in the same page.

Second. I am accused of having misrepresented Mr Robertson in the following sentence: 'He (Mr R.) has asserted distinctly that the Sheriff can discharge no other functions (other than those of an appeal judge)—that, as a judge in the first instance, his action is incompetent; and in asserting this, Mr Robertson has given to the world a statement which is absolutely the reverse of truth.' Mr Robertson says, 'There is no such statement in my pamphlet, from the beginning to the end of it,'—explaining that, when he limited the powers of the Sheriff to those of a judge of appeal, he referred only to cases in the ordinary action roll. Now, the fact is, that in the sentence he has quoted from my article, I too was speaking only of cases in the ordinary action roll, as the context and the scope of my argument will plainly show; and there is, therefore, on Mr

Robertson's own showing, no misrepresentation here at all. But more than this, even if my sentence were taken altogether apart from the context, how does it misrepresent the views which Mr Robertson tells us he communicated to Scotch members of Parliament, in the following words: 'I at once replied that the Sheriff-depute could do nothing of the kind (that is, could not discharge every duty and function of the office of Sheriff); that he had by statute ceased to be the resident judge of the sheriffdom; *that he was now an intermediate appeal judge merely*; and that *even as an appeal judge he was so only in that comparatively limited class of cases (the ordinary action roll) which are conducted on written pleadings.*' Indeed, as to the charge of having misrepresented Mr Robertson, I must say I feel easy; for his views are so confused, so contradictory, and so very carelessly expressed, that the rendering of them into English was a task of no small difficulty, and I therefore allowed him to speak for himself to an extent which I often felt was unkind to your readers. Thus, immediately before the sentence of which he complains, I had trespassed upon their patience so far as to fill about a page and a half of your space with quotations from Mr Robertson's first letter. After such a stretch on my part, I cannot but feel this charge somewhat ungrateful in Mr Robertson.

II. Mr Robertson accuses me of having imputed to him the delinquency of making 'an unfounded statement as to the powers of the Sheriff-depute, in the full knowledge of the contrary, from the assistance which I had myself received from the late Lord Handyside.' Mr Robertson's use of the English language is very puzzling: I can but guess at what he means here by the 'full knowledge of the contrary;' and my guess is, that he accuses me of having imputed to him the personal knowledge of facts at variance with his theory of the powers of a Sheriff. This is a mistake. I do not think my language can be construed as conveying—I am sure I never intended to convey—any such imputation. I have never stooped, and will not even now stoop, to the degradation of bandying with Mr Robertson such words as 'persistent and systematic disregard of truth.' I never imputed knowledge on any subject to Mr Robertson; on the contrary, I expressed surprise at his ignorance. And, after his explanation, I continue in that surprise. Mr Robertson says, 'I gratefully remember his (Lord Handyside's) great kindness in undertaking for me the duties of resident Sheriff at Falkirk during several weeks of the autumn of 1852.' May I be permitted to inquire by whose authority Sheriff Handyside officiated as resident Sheriff on that occasion; and in what capacity he acted? Was it as the substitute of himself, or as the *depute* of his substitute? Or was it in virtue of his original jurisdiction as Sheriff under his commission from the Crown? If Lord Handyside did, in point of fact, exercise original jurisdiction as Sheriff of Stirlingshire in 1852, as Mr Robertson admits, was I not justified, according to the strictest rules of fair discussion, in referring to that fact, in refutation of Mr Robertson's assertion that such a proceeding was 'incompetent.' But Mr Robertson adds, 'I am very certain that during that time he never decided any case in the first instance which depended before his ordinary court, *unless he did so of consent of parties.*' Now, surely, if it were competent for the Sheriff to pronounce interlocutory orders in the exercise of original jurisdiction, it

must have been equally competent for him to have proceeded to decide the cause on the merits. And, indeed, the explanation which I have quoted, coming from one who has access to the records of the Court, looks very like an admission that Sheriff Handyside did decide causes in the ordinary roll, though Mr Robertson afterwards observes that he has no 'reason to believe' that he did so. The suggestion that his authority was derived from 'the consent of parties,' in no way affects the argument. That their consent, if required, was readily given, I can easily believe. I should regret exceedingly had I written a single word implying that there was ever a litigant in Stirlingshire who would have refused his consent to the decision of his case by Lord Handyside instead of by Mr Robertson. But, admitting that Lord Handyside never *decided* a case in the first instance at all, I yet fail to reconcile the fact that the Sheriff of the county of Stirling relieved his substitute for 'several weeks in the autumn of 1852,' with Mr Robertson's statement that the provisions of the Act of 1838, requiring the Sheriff thus to attend personally during the absence of his substitute, '*cannot now be carried out,*' and that because the Sheriff '*can do NOTHING in the first instance,*' with regard to the ordinary action roll, or, as he elsewhere puts it, '*cannot act in the ordinary court to any effect or purpose whatever.*'

III. Mr Robertson accuses me of 'ignorance or disregard of truth' in the following matter: 'This reviewer informs us that the appellate jurisdiction was introduced in 1747, by the direct enactment of the *Jurisdiction Act.*' I never said anything of the sort. I am not aware that the appellate jurisdiction of the Sheriff was ever introduced by the direct enactment of any statute whatever. What I said was, that, in virtue of the provisions of the Jurisdiction Act, the Sheriffs came to exercise the power of reviewing the judgments as well as of controlling generally the proceedings of their substitutes; that this appeal became frequent, as the country increased in wealth and population; and that, accordingly, when Mr Robertson declares that under the Jurisdiction Act the Sheriffs 'possessed no appellate jurisdiction whatever,' he misrepresents the scope of that Act; and I say all this still.

IV. Mr Robertson calls me 'such a stranger to truth, that it is incomprehensible to him, when set forth in the plainest language.' The following is Mr Robertson's idea of truth set forth in the plainest language:—'I state in my second letter (as in my first), that the Sheriff in the ordinary court can do nothing, in the first instance, beyond pronouncing a merely formal order—that *his doing so* is incompetent and illegal: I say farther, that whatever the Sheriff-depute may be in theory, he is practically merely an appeal judge.' Here again, Mr Robertson's meaning can but be guessed at; for whether the words '*his doing so*' mean that it is illegal for the Sheriff to pronounce a formal order, or that it is illegal for him to do nothing, or that it is illegal for him to do anything, no man can certainly say. But, penetrating as best I can the dim obscure of Mr Robertson's English, I gather his meaning to be, that a certain procedure is *illegal* and *incompetent*; and then again, that the same procedure, *whatever* it may be in theory, *i.e.*, although it may be in theory both legal and competent, has practically fallen into desuetude: and I cannot but think these propositions inconsistent; and because of this, I am to be vilified as 'a stranger to truth.' I can only fall back upon Dr Johnson's consolation: I have

given Mr Robertson arguments; I cannot give him what nature has denied.

These explanations, sir, I have thought due to your Journal. For the rest, Mr Robertson's passionate iteration of former blunders is not of sufficient importance to deserve farther exposure; and while his grossly abusive language might easily be made to furnish your readers with much amusement, to gibbet a man who holds an important public office is no pleasure to me. So far as Mr Robertson made this a duty, I have sufficiently discharged it.—I am, sir, your obedient servant,

THE WRITER OF THE ARTICLES ON THE SHERIFF COURTS.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

HUNTER (LOTHIAN'S TRUSTEE) AND OTHERS v. CARRON COMPANY AND OTHERS.—*Jan. 27.*

Partnership—Fraud.

This is an action brought by Mr Hunter as sole surviving trustee under the marriage-contract of Mr and Mrs Lothian, and by the parties interested in the residue of the trust estate, against the Carron Company and certain individual defenders, for the purpose of having the balance-sheets of the company from 1st January 1824 to 31st December 1846, and other documents, reduced, in so far as regards the proportion of the profits of the company effeiring to ten shares which belonged to Mrs Lothian during that period, and which profits, as the pursuers allege, were fraudulently concealed and withheld from her, and the pursuers as in her right. The summons likewise concludes for declarator that the pursuers have the exclusive right and title to, and beneficial interest in, the proportion of the profits or dividends which effeired to the said ten shares during the period above mentioned, and for payment of the balance which upon an accounting shall appear to be still due to the pursuers as in right of Mrs Lothian, or, failing such accounting, for payment of L.30,000. To this action certain preliminary defences were stated for the Carron Company, founded mainly upon the terms of a deed executed by Mrs Lothian on 16th June 1843, in virtue of the reserved powers contained in her marriage-contract. By that deed she directed her trustees to allow her husband, Mr Lothian, an option of taking the said ten shares as part of his provisions under the marriage-contract, these shares to be estimated to him as not exceeding in value the sum of L.6000; and in the event of the Carron Company insisting on having the first offer of the shares, she provided that any increased price which the trustees might get therefor beyond L.6000 should belong as a gift to her husband, Mr Lothian. Mr Lothian, upon the death of his wife, availed himself of the option thus

conferred upon him; and as the company insisted on exercising their right of pre-emption, the shares were made over to them at the price of L.6800. Mr Lothian afterwards married again, and his second wife, who survived him, and who is his executrix, brought an action against the Carron Company, with conclusions somewhat similar to those of the present summons. The action at the instance of Mr Lothian's executrix was settled by the Carron Company paying to her a sum of L.11,000, and she thereupon assigned to the company her whole rights in reference to the said shares.

The preliminary defences for the Carron Company in this action are to the effect that the pursuers have no title to sue, and that the Carron Company are not bound to satisfy the production, in respect that the interest of the trust estate in the said shares was, by the deed of 16th June 1848, limited to L.6000; that the right to everything which might increase the value of the shares beyond that sum was conferred upon Mr Lothian; and that the undivided profits accordingly belonged to him or to his executrix in his right, and that the company, on coming in room and place of his executrix under the above-mentioned assignation, is now possessed of a title to exclude the pursuers' claim.

Lord Mackenzie (Ordinary), by interlocutor of 18th December last, reserved these defences to be discussed along with the merits, on the ground that they were mixed up with the merits; and the Carron Company having reclaimed, and pleaded that the defences were proper preliminary defences, and should be sustained as such, the Court to-day adhered to the Lord Ordinary's interlocutor.

App., THE INSPECTOR OF POOR OF THE PARISH OF LARGS v. DUNLOP AND WILKIE.—Jan. 28.

Burial-Ground—Process.

In the year 1856 the Parochial Board of Largs purchased certain lands from the Earl of Glasgow for a burial-ground, and expended large sums upon it. Several questions arose as to the suitability of this ground, which was objected to by the parish on the ground that it consisted principally of rock, which would make the expense of opening graves excessive; and in 1863 several persons in the parish, and amongst others the respondents, presented a petition to the Sheriff-substitute of Ayrshire at Kilmarnock, setting forth that the Parochial Board had not provided a burial-ground, though required to do so, and praying the Sheriff, in terms of the statute, to designate and set apart a suitable portion of ground for that purpose. The Sheriff-substitute remitted to Mr Slight, the superintendent of the Necropolis, Glasgow, to report on the ground which had been bought by the Parochial Board, as to the expense of digging graves therein, etc. After Mr Slight had reported, the Sheriff found that the Parochial Board had taken no steps to provide a burying-ground where interments could take place at rates of which he could approve, and therefore designated a different piece of ground, and appointed the Parochial Board forthwith to proceed to acquire the same in terms of the Act. Against this interlocutor of the Sheriff-substitute, the Inspector of Poor appealed to the Court of Session. The respondents in this appeal, Dunlop and Wilkie, objected to its competency on the ground that appeal was limited under the 10th section of the Burial-Grounds Act to

questions arising with the owner or owners of land proposed to be designated as a burial-ground. The Lord Ordinary (Jerviswoode) repelled this objection, recalled the Sheriff-substitute's interlocutor, and allowed the petitioners (the respondents in the appeal) a proof of their averment that the Parochial Board had failed to provide a suitable burying-place, and to the Inspector of Poor a proof also thereanent. Against this interlocutor the respondents in the appeal reclaimed to the Inner House. The inspector objected to the competency of the reclaiming note, on the ground that by the Burial-Grounds Act the Lord Ordinary's judgment was declared to be final. The reclaimers contended that the reclaiming note was competent, notwithstanding that provision in the statute, in respect it brought under review a judgment incompetently pronounced by the Lord Ordinary, his review of the Sheriff's judgment being excluded (as they contended) by another section of the Act.

The Court held that the reclaiming note was incompetent.

KELLAHIN v. BEGGS' TRUSTEES.—Jan. 28.

Professional Service—Discharge.

This was an action to recover the sum of L.50 as a recompense to the pursuer for going to America at the request of the late Mrs Beggs, assisting her in winding up her affairs, and returning with her to this country. The action was founded on certain letters of the deceased, and also on the circumstance that Mrs Beggs had admitted the claim by consenting to refer the matter to two persons, one of whom fixed L.70 as the sum due, and the other L.30; but as no umpire had been named, no decision was pronounced. Three days after, the deceased paid pursuer L.8, and he then granted a receipt in terms which he now contended were not meant as a discharge of the rest of the claim, and craved inquiry into the circumstances. The Court held that the receipt could not be contradicted, and affirming the Lord Ordinary's interlocutor, dismissed the action.

WELSH v. EDINBURGH AND GLASGOW RAILWAY COMPANY.—Feb. 2.

Reparation—New Trial.

The pursuer in this case is Mr Welsh, of the firm of Holtum and Welsh, tailors and clothiers in George Street, Edinburgh. Having been very much injured at the Winchburgh accident on the Edinburgh and Glasgow Railway, he raised an action of damages against the Railway Company, and obtained a verdict from the jury for L.3000. The defenders now moved for a new trial, on the ground that the damages awarded were excessive, in respect the pursuer's recovery had been much more complete than had been anticipated at the time of the trial, and that any permanent effects of the accident could now be shown not to impair to any extent his chances of longevity.

The Court refused to set aside the verdict, the Lord President observing that, though the damages were heavy, they were not so outrageously so as to warrant the Court in interfering with the estimate of the jury.

MORTON AND OTHERS v. EDINBURGH AND GLASGOW RAILWAY COMPANY.—Feb. 3.

Reparation—Master and Servant.

This is an action at the instance of the widow and family of the late

Robert Morton, engine-driver in the employment of the defenders, and who was killed at the Winchburgh accident, for reparation for the loss, injury, and damage sustained by them through his death. The pursuers proposed an issue to try the question whether the collision took place through the fault of the defenders. The defenders objected to any issue being allowed, on the ground that the pursuers' allegations on record imputed the negligence charged to some one in the employment of the Company, and that there were therefore no grounds of action, because this would be the negligence of a fellow-workman of the deceased, for which the employers were not responsible. The Lord Ordinary (Kinloch) reported the case, stating in a note that the pursuers' averments did not necessarily infer that the negligence alleged was that of a person standing in the relation of *collaborateur* to the deceased, but, on the contrary, implied that the negligence was in the general management of the Company. At the discussion to-day it was contended for the defenders that all the parties in their employment, from the managers downwards, were to be regarded as *collaborateurs*, and that a master not being liable for injuries sustained by the fault of a fellow-workman, no issue should be allowed.

The Court unanimously allowed the issue proposed by the pursuers, and found them entitled to expenses.

THE LORD ADVOCATE v. M'NEILL.—Feb. 6.

Revenue—Donation.

The question raised in this case is whether inventory duty is due to the Crown on a sum of L.6000, to which it is alleged the defender succeeded on the death of his mother. In 1838, Lachlan M'Neill Campbell, the elder brother of the defender, granted a bill to his mother for L.6000 advanced by her to him, to enable him to make up the purchase-money of an estate. Mrs M'Neill endorsed this bill to her second son, Dugald M'Neill, the defender, who, founding on the bill, contends that the sum therein was absolutely transferred to him of the date of the endorsement, that it was therefore not *in bonis* of his mother at the time of her death, and no inventory duty was payable in respect thereof. A proof before answer was allowed to both parties. The Crown adduced the defender and his sister as witnesses. The former stated that his memory was, from bad health, so entirely gone that he could remember nothing of the circumstances connected with the bill in dispute. The evidence of the latter was generally to the effect that she understood that the bill had been given to the defender by his mother for his own use. The defender adduced no evidence. The Lord Ordinary (Ormidale) held that the defender had failed to establish that the L.6000 bill founded on by him had been made over to him by his mother as a gift or donation, and that as her executor, therefore, he was liable for inventory duty on the amount.

To-day the Court (Lord Deas dissenting) recalled the Lord Ordinary's interlocutor, holding that the import of Miss M'Neill's evidence on the whole event went to show that the bill had been endorsed to the defender by his mother as a donation, and was therefore not *in bonis* of her at her death, and not liable to inventory duty.

NEVILLE v. THE GREENOCK AND GOUROCK OMNIBUS COMPANY
AND CLARK.—Feb. 6.

Reparation—New Trial.

This was an action of damages for personal injuries sustained by the pursuer in a collision between two omnibuses, the property respectively of the defenders. The pursuer was travelling on Clark's omnibus, and the Company's omnibus in passing Clark's ran up on some earth at the side of the road, canted over, and in falling, the footboard struck the pursuer's leg, causing the injury for which reparation was sought by the present action. An issue was sent to a jury to try the question whether the collision was caused by the fault of the drivers of the omnibuses, and if so, whether by both, or which. No appearance was made for the Omnibus Company at the trial, which proceeded as between the pursuer and Clark. The jury found for the pursuer as against both defenders, and assessed the damage at L.200. The defender Clark moved for a new trial, on the ground that the verdict was contrary to evidence.

The Court (Lord Deas dissenting) granted a new trial; but, in respect of the difference of opinion on the bench, only on the condition that the expenses of the defender's trial should be paid by the defender Clark.

HOWDEN (LORD ELPHINSTONE'S TRUSTEE) v. LADY HAWARDEN AND
OTHERS.—Feb. 9.

Entail—Reduction.

The present action is brought by the trustee on the sequestered estate of the late John Fleming of Biggar and Cumbernauld, afterwards fourteenth Lord Elphinstone, in order to have it found that certain deeds of entail, under which Lord Elphinstone held, were invalid, and the title found to have been one in fee-simple. It also contains conclusions of reduction of the title made up by the defender, Lady Hawarden, as heiress of entail under the deeds in question, and for delivery of the late Lord Elphinstone's titles. It was objected by the defender that the action is incompetent, inasmuch as there already depends in Court an action at her own instance against the trustee, for the purpose of having the entails declared valid. In that action the trustee has stated defences, and it is contended that in it the whole matter of controversy will be determined, and that the present action is therefore inadmissible. The Lord Ordinary (Kinloch) repelled the plea of *lis alibi pendens*, and the defender reclaimed.

The Lord President said it was quite clear there was no incompetency in the present action. Various considerations went to support the competency, not the least strong of which was that the pursuer was a trustee on a bankrupt estate, and was therefore entitled to insist in action of his own for the purpose of realizing that estate. It was not expedient that his right should be made dependent upon the issue of an action at the instance of another person, which might, at the will of that person, prove abortive by being abandoned at any stage.

The Court, therefore, adhered with expenses.

JARDINE'S TRUSTEES v. THE CARRON COMPANY.—Feb. 10.

Partnership—Fraud.

The pursuers in this case, who are the trustees of the late John

Jardine, Esq., Sheriff of Ross, sue the defenders, William Dawson and others, now or formerly managers or agents of the Carron Company, for damages, alleged to be due through the pursuers having been induced to sell certain shares of the stock of the Carron Company at less than their value, in consequence of the affairs of the Company having been concealed and misrepresented by the defenders. The issues for the pursuers—which have been approved of to try the case—put the question, Whether they were induced to sell the shares in question at a certain price by false and fraudulent representations and concealment on the part of the deceased Joseph Dawson, acting in concert with William Dawson, Henry Dawson, and Henry Stainton, or with one or more of them, in regard to the affairs of the Carron Company, to the loss, injury, and damages of the pursuers?—damages being laid at L.20,000. The defenders aver that the late Mr Jardine was privy to the actings and representations of the defenders, and availed himself of them, and benefited by them, and accordingly proposed that a counter issue should be allowed to them to the effect—Whether, by the knowledge and conduct of Mr Jardine in regard to the affairs of the Carron Company, the pursuers were barred from insisting in the claim for damages alleged to have been occasioned by the sale of the said shares?

The Court to-day disallowed the proposed counter issue, holding that as the question raised by it was a direct negative of that put in the issues for the pursuer, no counter issue was necessary to enable the defenders to prove the alleged knowledge and conduct of Mr Jardine.

Pet. and Com., SIR R. MENZIES *v.* MACDONALD.—Feb. 13.

Interdict, breach of—Fishing.

In 1857, Sir Robert Menzies obtained an interdict against Alexander Macdonald, innkeeper, Macdonald Arms Inn or Hotel, Kinloch Rannoch, interdicting him, his servants, friends, guests, lodgers, family, and dependents, or others in his name or employment, or acting under his authority or permission, or as in his right, from entering, landing, or in any way trespassing upon any part of the lands adjacent to, and the islands situated in, the lake or loch called Loch Rannoch, in the shire of Perth, forming part of the estate of Rannoch, the property of the suspender; and also from drawing nets and boats upon, or landing oars or nets, or fishing implements, or tackle, or any other articles upon or in any way making use of, the said lands or islands, and from troubling, molesting, or in any way interfering with the suspender in the peaceable possession and enjoyment of the said lands or islands, or any part of them, in any manner of way. Sir Robert Menzies and the other proprietors of lands adjacent to Loch Rannoch have a joint right or common property in the loch, and a joint right of sailing and trout-fishing therein. The inn which the respondent occupies is the property of General Sir John Macdonald of Dalchosnie, being part of the estate of Kinloch, lying adjacent to Loch Rannoch; and as his tenant, the respondent has his permission to sail boats on and fish in Loch Rannoch, by himself, his guests, or servants. In 1863, Sir Robert Menzies presented the present petition and complaint, praying the Court to find that the respondent had been guilty of contempt of Court and breach of interdict, and therefore to fine him in a sum of L.100, or such other sum as their Lordships might deem meet. In the

petition two breaches of interdict are alleged to have been committed—the first on 3d July 1863, when the respondent, accompanied by a guest at his inn, is alleged to have run ashore a boat on the petitioner's lands at a place called Sandy Point, and allowed it to remain there for some time, after which they put out into the loch again. The second breach is said to have been on 21st July 1863, when it is alleged that a boat belonging to the respondent, in which there were two guests from the inn, and one of the respondent's boatmen or servants, was landed or run ashore on one of the islands in the loch belonging to the petitioner, and allowed to rest there for a considerable time. In the answers to the petition the respondent admits that the interdict stated was obtained in absence of Sir Robert Menzies; but he avers that, although he has been in the habit of sailing and fishing in the loch with his guests and his servants, he never committed any breach of interdict, or landed on any part of the lands adjacent to, or islands in, the loch forming part of the estate of Rannoch, the property of the petitioner, and that he had strictly charged his servants and guests not to do so.

The Court unanimously refused the petition and complaint, and assoltized the respondent with expenses, holding that, in regard to the alleged breach of interdict on 3d July, there was no evidence to support it at all, it being admitted that the *sohum* of the loch was not the property of the petitioner, but belonged jointly to the adjacent proprietors, and it being proved that the boat on that occasion was resting on the *sohum* of the loch several feet from the shore. In regard to the alleged breach of interdict on 21st July, their Lordships were of opinion that the preponderance of evidence was in favour of the view, that on that occasion also no part of the boat was out of the water resting on the island; and they were further of opinion, that even if it had been so, it was sufficiently proved that the placing the boat in that position would have been a contravention of express orders by the respondent to the contrary, for which he could not have been liable in the present application. Lord Deas further indicated that, apart from this, he had great doubts whether running a boat up a couple of feet or so on an island, whilst those on board were lunching, and without any of them landing, would be a breach of the interdict in the terms in which it had been granted.

App., YOUNG v. LANG.—Feb. 18.

Smoke Prevention Acts.

By the Acts 7 and 8 Geo. IV., c. 43, it was enacted that the proprietors and occupiers of certain kinds of maufactories and works within the city of Glasgow, or two miles from the Cross thereof, should, after the passing of the Act, construct the fireplaces or furnaces and chimneys of the steam-engines and other works in such a way as to consume the smoke arising therefrom as far as practicable. The respondent in the present appeal, who is one of the Procurators-fiscal of Glasgow, presented a petition in 1862 to the Dean of Guild of Glasgow, praying for a remit to men of skill, in terms of the said Act, to examine the works of the appellant, at No. 9, Shuttle Street, Glasgow, known as a tallow chandlery, and to report what alterations were necessary to obviate the nuisance caused by large quantities of smoke emitted from them. The Dean of Guild found it proved, after hearing parties, that the works in

question emitted large quantities of smoke, and remitted to certain men of skill in Glasgow, who reported what changes they considered necessary to make the works consume their own smoke. The Dean of Guild having approved of this report, and ordained Young to make the alterations recommended, he presented the present appeal, and contended that the Act of Geo. IV., on which the Procurator-fiscal's complaint proceeded, did not apply to the works in question; and further, that he was not bound to make the alterations suggested, in respect they were merely new and untried arrangements which were not practicable, having regard to the nature of the business carried on in the works, and that even if adopted they would in no way tend to the consumption of smoke. The Court remitted to the same men of skill to report again on the alterations proposed by them, with reference to the objections stated by the appellant to their last report. These gentlemen gave in a further report, considerably modifying their former one, and the case was in the roll to-day for further discussion.

The Court, after hearing counsel, repelled the plea of the appellant that his works were not of the description referred to in the Act of Parliament, and held that they must be made conformable to the best construction of such works now in use; and that as the changes proposed in the second report would produce this effect without interfering with the carrying on of the business, they ought to be made. There was some discussion as to the form in which the judgment of the Court should be put, the appellant contending that the jurisdiction of the Court was exhausted by their merely *finding* that the alterations should be made; the respondent, on the other hand, contending that a remit should be made to the Dean of Guild to see the alterations executed. The Court took time to consider the form of their interlocutor.

After some discussion, the Court found the respondent entitled to expenses, but subject to modification (to an extent to be fixed when the account had been taxed), in respect that the alterations now appointed to be made were materially different from those suggested in the report of which the Dean of Guild approved.

WATT v. HAMILTON.—*Feb. 19.*

Contract—Professional Employment.

The pursuer, from 1843 to the end of 1860, was a cashier and book-keeper in the employment of Messrs William and James Davidson and Co., muslin manufacturers and merchants in Glasgow, of which firm the defender is a partner. In 1850, Mr Davidson of Ruchill, also a partner of the said firm, died, leaving considerable property and a trust-deed, naming amongst others the defender as one of his trustees, who was also appointed by the other trustees factor for the trust. The books and accounts of the trust were kept by the pursuer from 1850 to 1860, without any increase in respect thereof to his salary. In 1857, the defender received a factor fee of L.1000 for the preceding seven years; and the pursuer having claimed in 1860 some remuneration for his trouble in acting as clerk in the trust matters, which the defender refused, the present action was brought, concluding for L.525; being remuneration at the rate of L.50 a-year.

A proof having been led, the Lord Ordinary (Jerviswoode) found, *inter*

alia, that the services alleged by the pursuer had been performed by him ; that no payment had been made to him, therefore that there had been no stipulation or agreement between him and the defender as to whether any remuneration was to be allowed ; that it was not proved that the pursuer undertook to perform the work without remuneration, or that it was intended to be covered by his salary ; and that L.20 per annum was a reasonable allowance for the services which he had performed. His Lordship further found, in point of law, that the pursuer was entitled, on the principle of *quantum meruit*, to be remunerated for the work he had done ; but, in respect of the delay in making his claim, and that the amount had not been ascertained till now, found that no interest was due on the sums decreed for prior to the date of the interlocutor.

The defender having reclaimed, the Court to-day, after hearing counsel, adhered to the Lord Ordinary's interlocutor, Lord Deas dissenting on the ground that the impression produced on his mind by the proof was that the pursuer, in acting as clerk to the defender in regard to trust matters, never anticipated he was to get any special remuneration therefor ; that the idea of making a charge had only occurred to him on seeing his master get a factor fee in 1857 ; and that there was no principle in law entitling one to turn round and claim remuneration for work intended at the time to be performed gratuitously. His Lordship expressed his regret at feeling compelled to dissent, as, if he could conscientiously have done so, he would gladly have favoured the pursuer's case.

Declarator of Non-Entry, HOPE v. HOPE.—Feb. 20.

Sale—Clause of Relief.

This was an action raised by G. W. Hope of Craighall and Waughton, against Sir Archibald Hope of Craighall. The following statement, explanatory of the action, is taken from the note to the Lord Ordinary's (Lord Benholme's) interlocutor of 15th March 1858 :—In this case the pursuer is a singular successor in the superiority, whilst the defender is a singular successor in the property. The original feu-charter was granted in 1718. It contains two clauses—one relieving the vassal of public burdens, and the other relieving him of minister's stipend and reparation of manse. Neither of these were noticed in the original infeftment so as in any way to enter the record. Between the date of this original constitution of the feu, and the first renewal of the investiture, the superiority had passed by purchase into the possession of the pursuer's family. In 1777, 1787, and 1817 respectively, the investiture was renewed by ancestors of the pursuer in favour of descendants of the original vassal, by precepts of *clare constat* and infeftment, in which no mention is made of these clauses of relief, and no reference is made to the feu-charter of 1718, or its contents. The *dominium utile* continued to be held on these feudal titles from 1777 until 1826, when it was acquired by purchase by the defender's father, who was infeft base. The conveyance in his favour contains no mention or special conveyance of these two clauses of relief. The question which occurs in this declarator of non-entry is whether the defender, who is now to enter as vassal or heir to his father, is entitled to insist upon having these clauses of relief introduced into the investiture to be renewed in his favour, either by express recital, or by that special reference to the original charter which might be equivalent to it, under the new

form introduced by the Titles to Land (Scotland) Act, 1858. His Lordship held that these clauses constituted no essential part of the feudal title, and that the pursuer is not now bound by them; that if they were mere matter of personal contract, the defender had acquired no sufficient title to enforce them against the pursuer; and that if they could be viewed as forming qualities of the real title of the vassal, they had been worked off by the effect of prescription. His Lordship, therefore, pronounced an interlocutor, in which he found 'that the defender is not entitled to insist that clauses of relief as to public burdens, or as to stipend and reparation of manse, should enter the renewed investiture, or that the writ of confirmation, or of *clare constat* to be granted by the pursuer in terms of the Titles to Land (Scotland) Act, 1858, should refer to and specify the charter of 1718, as containing the conditions of the renewed investiture.'

Sir Archibald Hope reclaimed.

The case was advised to-day, when their Lordships reversed the interlocutor of the Lord Ordinary.

SECOND DIVISION.

M.P., THE CLYDESDALE BANKING COMPANY v. MURDOCH (REAL RAISER) AND OTHERS.—Jan. 28.

Bankruptcy—Collusion.

This is a process of multiplepounding raised by Mr Murdoch as a creditor who was ranked in the sequestration of Adam William Dunn. The Clydesdale Banking Company, who are the nominal raisers of the process, were also creditors of Mr Dunn ranked in the sequestration in respect of two debts, the one being for L.128, 16s. 7d., claimed and ranked for by them as in their own right, and the other for L.450, 17s. 7d., claimed and ranked for by them as in right of the Edinburgh and Glasgow Bank. The action was raised by Mr Murdoch, in name of the Clydesdale Bank, in virtue of sec. 150 of the Bankrupt Act of 1856, 19 and 20 Vict., c. 79, which declares all collusive preferences, gratuities, securities, payments, or other consideration, given or promised by a bankrupt for procuring his discharge to be void, and that in such a process as the present the amount of the colluding creditor's debt, besides double the amount of the value of the preference given or promised to him, may be made a fund of division among the creditors of the bankrupt. The Clydesdale Bank—who, it is alleged by the real raiser, Mr Murdoch, obtained or were promised by Mr Dunn, the bankrupt, a preference, gratuity, or other consideration for their consent to his discharge under a composition arrangement—objected to the present process as untenable in the circumstances, and a record has been made up betwixt them and Mr Murdoch. Lord Ardmillan, before whom the case then depended as Ordinary, allowed the parties a proof of their respective averments before answer; and a proof having accordingly been adduced, the case came to be debated before Lord Ormisdale. In the course of the debate, the real raiser, Mr Murdoch, proposed and was allowed to lodge the minute No. 120 of process, in which, on the narrative that the alleged collusive arrangement had 'not been proved to apply to the debt of L.128, 16s. 7d., for which the nominal pursuers, the Clydesdale Banking Company, claimed, and were ranked in their own right, in the said sequestration of Adam William Dunn; and in respect

the value of said collusive consideration is not, in the circumstances of the case, susceptible of a pecuniary estimation, he restricts the conclusions of the summons as a statement of the fund *in medio*, so far as directed against the nominal raisers, to the sum of L.450, 17s. 7d. sterling, being the amount of the debt for which the said Clydesdale Banking Company, as in right of the Edinburgh and Glasgow Bank, claimed, and were ranked in the said sequestration, but without prejudice to the conclusion for expenses.' On Mr Murdoch lodging his minute, the nominal raisers craved and were allowed to lodge three additional pleas in law, to the effect the collusive consideration, by way of preference, alleged to have been given or promised to the nominal raisers, being now admitted to be of such a nature as to be incapable of pecuniary estimation, the action must be held to have been from the beginning, and to be now, incompetent and untenable under the statute, and that it falls therefore to be dismissed.

The Lord Ordinary sustained these additional pleas.

Mr Murdoch reclaimed, and counsel were heard. To-day the case was advised.

The Lord Justice-Clerk said this action of multiplepoining could not have been maintained at common law. If it was competent at all, it was so under the 150th section of the statute. Now there could be no doubt that the proceeding was a highly penal one, and therefore the real raiser's averments, whether on record or in the minute, must be read very strictly. The question then came to be, What was the effect of the minute? It contained an expression, averment, or admission by the real raiser, that 'the value of said collusive consideration is not, in the circumstances of the case, susceptible of a pecuniary estimation.' Now he (the Lord Justice-Clerk) didn't say that, in order to found the proceedings under sec. 150, the collusive consideration must be pecuniary. But he was quite clear as to two things: first, that under sec. 150 the collusive consideration given for the discharge must be 'of advantage' to the creditor taking it; and second, if the consideration were such that, if not of pecuniary, it was of no other value, then if it was not of pecuniary value it did not raise a case under sec. 150. Here the minute expressly said that the consideration was not capable of pecuniary estimation; while it was clear that (being a letter of guarantee), if it was not of pecuniary value, it was of no value whatever. If so, then there was an end to this action, because there was an end to the offence. To stipulate for a consideration quite valueless at the time it was granted was not what was contemplated or forbidden by the statute.

The Court therefore dismissed the multiplepoining with expenses.

Pet., GEORGE KING AND OTHERS (TRUSTEES OF GEORGE STREET CHAPEL, ABERDEEN.—Jan. 30.

Trust—Power of Sale.

This was an application by the trustees of a dissenting chapel in Aberdeen, for authority to sell the chapel, in respect that it has become quite unsuitable as a place of worship, and that a site has been purchased and funds have been subscribed for the erection of a new church. The petition is presented in accordance with a resolution of a meeting of the members of the church, who are the beneficiaries of the trust, passed by a

majority of 55 to 6. It was explained that the ground for presenting the petition is that the petitioners do not maintain that they have either an express or implied power of sale, but ask the Court to authorize the sale in respect of the extreme expediency and justice of the proceedings in the circumstances.

The Lord Ordinary (Barcaple) reported the petition to the Second Division, with a note expressing views adverse to its competency.

After hearing counsel to-day in support of the petition, the Court remitted to the Lord Ordinary to dismiss it as incompetent.

MRS CAMERON AND OTHERS v. ANDERSON AND OTHERS (WEST'S TRUSTEES).—Feb. 2.

Revocation—Deathbed.

By his deed of settlement, dated 4th May 1852, the late Wm. West, Mansfield Place, Edinburgh, made certain special conveyances of defined heritable properties in favour of the individuals therein named. He then conveyed to trustees 'all lands and heritable estate of every description, excepting always the subjects specially before disposed, that shall belong to me at the time of my death,' and his whole moveable estate. He reserves a power to revoke even on deathbed. By a codicil, dated 12th September 1862, Mr West expressly revoked certain of the special dispositions contained in his first deed of settlement. Of part of the subjects contained in these, he made a redistribution to different individuals by the same codicil. This codicil, it has been proved, was executed on deathbed. The Lord Ordinary (Kinloch) held that the codicil of 12th September 1862 was effectual to revoke the special conveyance in the deed of settlement, but ineffectual to convey heritable subjects to the prejudice of the heir-at-law, and the Court to-day adhered to the interlocutor.

BELL OR KENNEDY v. BELL.—Feb. 2.

Succession—Wife's Share of Goods.

The question in this case is, whether 'dead's part' was due, in consequence of the dissolution of the marriage of Mr and Mrs Bell of Enterkine by the predecease of Mrs Bell. At a previous stage of the case it was decided by the Court, that at the time of their marriage Mr and Mrs Bell were domiciled in Jamaica, and that at the time of its dissolution they were domiciled in Scotland. In that state of matters the Lord Ordinary (Kinloch) pronounced an interlocutor, in which he found that 'the question now raised as to the right of the children of the marriage between the defender and his deceased wife, Mrs Mary Anne Horack or Bell to a share of the defender's moveable estate, at the dissolution of the marriage by the death of the latter on 28th September 1838, is to be determined by the law of Scotland as the place of the domicile of the said spouse at that date; and that, according to that law, the three surviving children of the said marriage became entitled, on such dissolution jointly, and in equal portions, to one-third share of the goods in communion between their father and mother, comprehending the whole moveable estate of the spouses respectively as then existing.'

Mr Bell reclaimed, and to-day the case was advised.

The Court adhered to the judgment of the Lord Ordinary, on the

ground that they could not distinguish the present case from that of *Lashley v Hog*, decided in the House of Lords, as reported in 4 Paton's Appeals, 581.

HOWDEN (BLAIKIE'S TRUSTEE) v. THE SCOTTISH WIDOWS' FUND ASSURANCE SOCIETY.—Feb. 4.

Retention—Insurance.

This case was sent some time ago for the opinion of the whole Court. The following is the more important part of the opinion returned by the Lord President, Lords Curriehill, Mackenzie, and Barcaple (Lords Ardmillan, Deas, Jerviswoode, Kinloch, Benholme, and Neaves being disqualified, as members of the Scottish Widows' Fund Society): At the date of Blaikie's bankruptcy he held three policies on his life, effected with the defenders, and it is admitted that these are still subsisting policies. Two of these policies were made the subject of a special security to the defenders for a loan of L.1175, made by them to Blaikie. This was done by handing over the policies to the defenders in terms of an agreement, which was also delivered to them, but without assigning the policies. Including a balance of the loan of L.1175, there is a debt of L.2389, 4s. 6d. due by Blaikie to the defenders. On the other hand, the defenders are obligors in the three subsisting policies now held by Blaikie's trustee. In this state of matters the pursuer, Blaikie's trustee, has raised this action to have it declared—First, That on payment of L.625, 2s. 8d., being the balance remaining due of the loan of L.1175, with interest, he is entitled to delivery of the two policies which were made the subject of the security for that loan, and of the agreement constituting that security; secondly, That the whole three policies are subsisting policies, and that the defenders are not entitled to deal with them as surrendered policies, and to apply the surrender-values in payment of any part of the debt due to them; and thirdly, That the pursuer, on payment of the above-mentioned sum of L.625, 2s. 8d., and interest, has right to the policies, and absolute right of disposal thereof, 'free from any claim on said policies, or any of them, or the proceeds thereof, when the same may become payable after the death of the said John Blaikie, on the part of the said Society, in respect of any claim on said policies, or any of them, for moneys owing by the said John Blaikie.' There is also a petitory conclusion for delivery of the agreement constituting the security, and of the two policies, on payment of the L.625, 2s. 8d., in conformity with the first declaratory conclusion. The question on which the parties are truly at issue is embraced in the third declaratory conclusion quoted above. If that conclusion is not to be affirmed, the pursuer may possibly have no inducement to press the first conclusion for delivery of the agreement and two policies on payment of the L.625, 2s. 8d. and interest. It may not be for his interest to obtain delivery of the policies by making payment of that sum, if, after they are in his hands, or in those of any party to whom he may assign them, the claim upon them on the death of Blaikie may be met by a counter claim on the part of the defenders. But we are of opinion that, if this first conclusion is separately pressed, the pursuer is entitled to decree in terms of it. The defenders only obtained possession of the policies, under a limited title, for security of the loan of L.1175. We are of opinion that they are not entitled to continue this possession after

the loan is paid off for the purpose of securing another debt. The application of this well-recognised principle cannot be affected by the circumstance that the defenders, who hold possession of the policies in security of a particular debt, are also the obligors under the policies. Though the pleas of the defenders are broad enough to import a defence against the first conclusion, we do not understand that they are insisted in to that effect. The petitory conclusion must be disposed of in the same way as the declaratory conclusion to which it corresponds. As to the second conclusion,—viz., that the defenders are not entitled to treat the policies as surrendered, and to apply the surrender-values in payment of their debts,—they expressly disclaim the assertion of any right to do so. We are of opinion that the pursuer is entitled to decree in terms of this conclusion also. By the third declaratory conclusion, as we understand it, the pursuer seeks to have it found by anticipation, that after payment of the balance of the loan of £1175, the three policies shall be free from any claim on them, 'or on the proceeds thereof,' when they may become due after the death of Blaikie, in respect of any claim for money owing by Blaikie to the defenders. This imports that they are to be free from any claim by the defenders, to refuse performance of their obligations under the policies, so long as there remains a debt due to them by Blaikie. We think that the pursuer is entitled to have a judgment upon this point, though the contingency to which it refers—viz., the death of Blaikie while the policies continue to subsist—has not occurred, and possibly never may occur. The matter is now of practical importance for his guidance in dealing with the policies, and with the claim of the defenders as creditors in the sequestration; but we think that the contention of the pursuer on this point is not well founded. We are of opinion that the defenders, as debtors in the sums in the policies, are entitled to withhold payment of these sums so long as a debt of equal amount is due to them by Blaikie, the creditor in the policies.

The Lord Justice-Clerk said he dissented from the opinion of the consulted judges. He was satisfied there was no ground for any claim of retention or lien on the part of the defenders over these policies. The right under these policies was wholly contingent, and the condition upon which it depended—viz., Blaikie's death—had not occurred, and therefore the defenders were not entitled now to withhold these policies from the trustee representing the whole body of the assured's creditors.

Lord Cowan was of the same opinion.

Lord Ormisdale (who had been called in to make a quorum) also concurred.

The Court, therefore, in respect of the opinion of the consulted judges, decerned in terms of the first two declaratory conclusions, and assolizied the defenders from the third.

The Lord Justice-Clerk said he could not help expressing his regret that this important question had been decided by a majority of only four to three judges, while no less than six judges had declined the case on the ground of being interested, as members, in the defenders' Society. Such a ground of declinature was irrational and absurd, and legislative regulation upon the matter was urgently called for.

M.P., SCOTT (SCEALES' FACTOR) v. SCEALES.—Feb. 5.

Will—Codicil—Construction.

The question raised in this case is the effect of certain settlements and testamentary writings left by the late Mr and Mrs Sceales of Blackburn. Mr and Mrs Sceales executed a mutual trust disposition and settlement of their whole property in favour of the survivor, whom failing, certain trustees therein named, for certain purposes specified. Mrs Sceales survived her husband, and thereafter executed a trust deed of her whole property (including that conveyed in the mutual trust deed, to which she had acquired right by survivance) in favour of the trustees named in the mutual deed. Both those deeds were prepared by a law-agent, and were formally executed. The mutual deed remained in the hands of the family agent, but Mrs Sceales' own trust deed was in her possession. From time to time she wrote several holograph codicils at the end of her own deed. The last of these was in the following terms :—' In my last will and statement, June 14, 1854, It is my desire To Break all my Foregoing wills, In regard to my Foregoing daughters and sons. To the effect of a hundred pounds stg., only consent that Euphemia Meiklejohn shall have the thousand pounds Therein stated. E. SCEALES, Aug. 12, 1859.' By one of the holograph codicils appended to the trust deed Mrs Sceales named Mr Douglas, W.S., as a trustee and agent in the trust. On 20th January 1860, Mrs Sceales sent her own trust deed and relative codicils to Mr Douglas, with a letter in the following terms :—

'BLACKBURN HOUSE, January 20.

'DEAR SIR,—I have enclosed you my will, I had more written on sheets of paper which seem to have been taken off. I mean all the legacies In my will left to my Gd. Children to be taken from them except what is left to my sister Mrs Margt. Connal, who has left herself without anything, all the plate except what I gave away to be sold Napery to be divided Mrs Euphemia Ritchie to have only one Thousand pound out of the whole and to come to her Lawful heir Euphemia Ritchie Jaffray and Robert when the Funds can from my Brother's property shall have the Two Thousand Pounds divided One Thousand Jaffray and Five hund, to Robert, and five hundred to Euphemia Ritchie my Gd. daughter. If you think this addition Is not right, perhaps a neat small will might be made out that would cost little money.—I am dear Sir yours truly

'E. SCEALES.

'Christopher Douglas, Young St., Edinr.'

On 24th January 1860, Mr Douglas wrote to Mrs Sceales regretting the expressions of displeasure she had used in the codicils appended to the deed, and suggesting that as the meaning of the codicils was not clear, an entirely new settlement should be made. This letter made no special allusion to the letter from Mrs Sceales, quoted above. On 26th January, Mrs Sceales wrote to Mr Douglas that 'perhaps it would be well to have it done over again, I would wish to alter some little things,' and suggested that when the weather improved he might go out with one of her sons to see her on the subject. On 20th May 1860, Mrs Sceales died without having seen Mr Douglas or made any change on her settlements, and her

trustees having declined to accept, a judicial factor was appointed to execute the trust. In consequence of the ambiguous terms of Mrs Sceales' holograph codicils, it was found impossible to execute the trust extrajudicially; and the judicial factor raised the present process of multipointing, in which the fund *in medio* is the whole trust estate, amounting to between twenty and thirty thousand pounds. Mrs Sceales left several sons, one daughter, and numerous grandchildren. From the alterations on the deed of settlement made by the codicils, and the ambiguity of their terms, the daughter and most of the sons had conflicting interests in regard to the effect to be given to them, and therefore appeared as separate claimants in the process.

The Lord Ordinary (Jerviswoode), before whom the case depended in the Outer House, dealt with the question, What was the effect of the codicil quoted above, and the letter to Mr Douglas?—as preliminary to ascertaining the respective rights of parties under the deeds, and pronounced the following interlocutor:—‘Finds, 1st, that the writing or alleged codicil appended to the trust disposition and settlement of the deceased Mrs Euphemia Meiklejohn or Sceales, which writing commences ‘No. 8,’ and bears to be signed ‘E. Sceales, Augt. 12, 1859,’ is void and ineffectual, in respect of uncertainty as the true meaning thereof, as an expression of the will of the maker; and, 2d, that the letter from the said Mrs Euphemia Meiklejohn or Sceales to Mr C. Douglas, W.S., which forms No. 48 of process, does not constitute, and cannot be dealt with as, a testamentary writing or codicil, expressive, in whole or in part, of the last will or testament of the writer thereof; and, with these findings, and before further answer, appoints the cause to be enrolled, so that parties may be heard as to the effect of the foresaid findings on the rights and claims of the parties to the process; reserving, *in hoc statu*, all questions of expenses.’

Against this interlocutor, in whole or in part, reclaiming notes were presented by A. D. Sceales, the eldest son, Mrs Ritchie, the daughter, and Robert Sceales, the second son.

The case was advised to-day, when the Court recalled the Lord Ordinary's interlocutor on both its findings (Lord Cowan dissenting in regard to the second finding); found that the two trust deeds and holograph codicils, and the letter to Mr Douglas of 20th January 1860, formed the testamentary writings of Mrs Sceales, and fell to be construed jointly and as a whole; and remitted to the Lord Ordinary to hear parties on their respective claims.

Adv., SCRIMGEOUR v. STEWART.—Feb. 12.

Proof—Form of Interlocutor.

In this case the Court recalled an interlocutor pronounced by Lord Kinloch, finding it not sufficiently proved that the defender was the father of an illegitimate child of the pursuer, born on 3d October 1859, and adhering to interlocutors of the Sheriff and Sheriff-substitute of Perthshire, finding the paternity proved. In giving judgment, the Court observed upon the form of the interlocutor, allowing the proof in the Inferior Court as being inaccurate and inapplicable to the circumstances of the case in which a special defence had been stated that another man than the defender was the father of the child. The following are the terms of

the interlocutor :—‘ Allows the pursuer a proof of her averments, and to the defender a conjunct proof; grants diligence, etc.’ The proper form their Lordships thought should have been :—‘ Allows both parties a proof of their averments, and to the pursuer a conjunct probation, etc.’ Their Lordships were also of opinion that the Lord Ordinary had gone wrong in laying on the pursuer the *onus* of proving that no other man except the defender had had intercourse with her at the period corresponding to the conception of the child.

KENNAED AND SONS v. WRIGHT.—*Feb. 20.*

Process—Reclaiming Note—‘ Merits of Action.’

In this case the Lord Ordinary (Kinloch), on 29th January 1864, pronounced the following interlocutor, finding ‘ that the alleged contract, on which the present action is laid, was subject to the quinquennial prescription of the Act 1669, c. 9, and in respect that more than five years had elapsed, from the alleged date of the contract, prior to the raising of the action, is only provable by writ or oath of party, appoints the cause,’ etc. Against this interlocutor a reclaiming note was presented by the pursuers, which was in the single bills to-day. It was objected for the defender that the reclaiming note was incompetent, in respect it should have been presented within ten days.

The Lord Justice-Clerk said there could be no doubt that an interlocutor disposing of a plea of prescription was one disposing ‘ in whole or in part of the merits ’ of the action, and therefore a reclaiming note against it was in time before twenty-one days. The Court therefore repelled the objection to the competency of the reclaiming note.

APPEAL IN THE HOUSE OF LORDS.

CLEPHANE *et Al.* v. THE MAGISTRATES OF EDINBURGH; FORRESTER *et Al.* v. *eosd.* (TRINITY COLLEGE CHURCH).—*Feb. 15.*

We have not space for a full report of this interesting decision. The principle of the decision, however, is embodied in the judgment which we annex :—‘ Reverse all the interlocutors appealed from in the second suit, that instituted by Forrester and others, assoilzieing the defenders from the conclusions of the summons, and dismiss the same, but without expenses. In the first suit (Clephane and others, etc.) reverse the interlocutors appealed from, and declare that, under the circumstances of the case, and having regard to the usage which has uniformly prevailed since the establishment of the charity, it is fit and proper that so much of the money received by the defenders from the North British Railway Company as will be sufficient for the purpose, and not exceeding L.7000, should be applied in the purchase of a site, and in building a church which, after reserving full accommodation for the inmates of the hospital and persons connected therewith, will afford to all the inhabitants of the district such accommodation as was afforded by the College Church before it was removed. Declare that the new church ought to be built in connection with the hospital, or on a site as near thereto as may be found convenient. Declare that the duty of building such church belongs to the defenders, as trustees of the charity; but that they will not be

under any obligation to observe or follow the style or model of the old church in such rebuilding. Declare that such new church will be the property of the charity, subject to such usage, and if so used, then to be kept in repair and maintained in like manner as the old church was before it was removed by the railway company. Let the defenders forthwith bring in and lodge in the Court below a minute showing the site and plans for building such new church; and such building is not to proceed until such plans and site have been approved accordingly. Declare that all the residue of the money received from the railway company and all interest thereon, and all the rest of the property of the hospital, is applicable to the enlargement and maintenance of the charity, as declared and established by the charters of May 1587 and November 1587, according to a scheme to be settled for the purpose; and refer it to the Court below to settle and approve of such a scheme accordingly. Let the Court inquire and ascertain of what the property of the hospital consists, and in what manner the money received from the railway company has been invested by the defenders, and when such investments were made, and what sums have been received for interest thereon, and by whom and how the same has been applied. Declare that the expenses previously incurred by the plaintiff and defenders in the suit, '*Clephane and others v. the Lord Provost,*' etc., ought to be paid out of the funds of the charity, and let the same be duly taxed, and the amount paid out of such part of the property of the charity as the Court of Session shall deem most fit to be applied for that purpose.'

LEGAL INTELLIGENCE.

EXTENDED SITTINGS.—The Lords of Session have passed an Act of Sederunt, extending the sittings of the Inner House from the 20th to the 31st March.

THE

JOURNAL OF JURISPRUDENCE.

INSURANCE ON THE PROPERTY OF NEUTRALS.

THE policy of marine insurance, in the form universally adopted in the British Islands, contains the following clause in regard to the risks insured against :—‘ Touching the adventures and perils which we the assurers are contented to bear, and to take upon us in this voyage—they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart ; surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever ; barratry of the master and mariners ; and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods, and merchandise, and ship, etc., or any part thereof.’ This comprehensive clause is sometimes limited by the indorsation upon the policy of an express warranty of neutrality on the part of the assured. Often, however, such express warranty is not given ; and it is understood or expressed that the insurers shall take upon themselves the risk of capture by one or other of the belligerents in the war now raging in America. In Glasgow and other seaport towns, many insurances have been effected upon ships and cargoes intended to run the blockade of the Southern ports, and upon articles contraband of war. In the former class of insurances, premiums ranging from 50 to even 70 per cent. have been paid. In regard to contraband of war intended for the Federal States, as the risk of capture is much less, the premiums have not been so large. We think it may be interesting to inquire how our law stands in regard to the validity of such insurances, and as to the legal import of the clause which we have quoted when the insurer has NOT expressly undertaken war risks. Would action

be sustained in our courts upon a contract of insurance covering contraband of war to be conveyed to either belligerent, or a ship and cargo intended to violate the blockade? Such is the main question which we propose to discuss; but in doing so, we shall attempt a general survey of our law as regards insurance on neutral property.

By Royal Proclamation, dated 13th May 1861, her Majesty's subjects are officially informed of the existence of a war between two sections of the United States, and are commanded to observe strict neutrality, and to abstain from violating the law of the realm or that of nations. In reference to the effect of this proclamation, it is almost needless to observe that it does and can impose, legally, no new obligation on the subject, but only enforces the execution of laws previously in existence. Its chief importance in our present inquiry is as a distinct official withdrawal of British protection from trade with blockaded ports, and trade in contraband of war with either belligerent.

It is necessary, therefore, that we should ascertain the laws of nations as well as the laws of the realm to which the proclamation refers, and upon which it is founded. The case upon which we consult the law of nations is this:—A civil war having broken out in the American Republic, what does the law of nations require Great Britain or any other neutral power to do or to suffer, the parties to the struggle being treated *quoad hoc* as independent nations? Now avoiding for the present any inquiry into their principles, the requirements of international law, so far as bearing on our present subject, are plainly these. Great Britain is entitled to maintain friendly relations to the fullest extent with both belligerents; she is simply required as a neutral to treat both parties exactly alike. In one respect only do her dealings with the belligerents suffer a limitation, and that an absolute one. Being neither judge nor party, she may assist neither the one nor the other belligerent in carrying on the war. It is not enough in this case for her to assist both parties alike. Such is the general obligation imposed on Great Britain by international law. If one belligerent shall have established a lawful blockade of a hostile port, British ships and goods, sailing with the intention of entering the blockaded port, may be captured by the blockading power, and appropriated to its use, without recompense to the owners. Farther, if British merchants convey beyond British territory certain goods termed con-

traband of war to one party, the other may similarly seize these goods and confiscate them. There are other restrictions imposed upon British trade, such as the confiscation *ob contingentiam delicti* of property belonging to the same owner accompanying contraband of war, and the prohibition against entering into the colonial or coasting trade of a belligerent not permitted to British ships before the war. But it is unnecessary for our present purpose to examine the international law upon these points. It will be sufficient to dwell shortly upon the penalties of violating a blockade, or of carrying contraband.

The plenipotentiaries who signed the Treaty of Paris in 1856 published a declaration affecting both these points, dated 16th April of that year. Its fourth clause is—‘*Les blocus pour être obligatoires, doivent être effectifs, c’est à-dire maintenus par une force suffisante pour interdire réellement l’accès du littoral de l’ennemi.*’ This established no new rule, but merely confirmed one previously acknowledged by all states, and particularly by America, though it had been disputed in the beginning of this century by Britain and France.¹ If then a blockade is effective, if it is officially notified or sufficiently known, a British ship sailing with the intention of evading it is undoubtedly liable to confiscation by the law of nations. It makes no difference what sort of cargo the neutral ship may be carrying, or indeed whether she has any cargo at all. Provided that there is a distinct endeavour to violate a blockade, coming out of a blockaded port is as much breach of blockade as trying to enter it; and lingering near a blockaded port, as well as commencing or continuing in the course towards it after notification, when it shows an intention to enter the port, is a breach of blockade. There can be little question that these three requisites—(1) an effective blockade, (2) sufficient knowledge, and (3) attempt to violate—have frequently concurred in the present war, so as to entitle the Federal States to seize many British ships and their cargoes.

In regard to contraband of war, the Paris Declaration contains in clauses second and third the provisions,—*Le pavillon neutre*

¹ An effective blockade is one maintained by a sufficient force, in such proximity to the hostile port as to render it plainly hazardous for a neutral ship to attempt to enter.—Heffter *Völkerrecht*, sec. 155. The present blockade of 3000 miles of coast has been repeatedly complained of by the Confederate States as ineffective, and this is strenuously urged in their President’s Message, dated 7th December 1863.

couvrir la marchandise ennemie, à l'exception de la contrebande de guerre. La marchandise neutre à l'exception de la contrebande de guerre, n'est pas saisissable sous pavillon ennemi. The Confederate States, but not their antagonists, have adopted these clauses. It is unfortunate that no definition of what is contraband was attempted by the plenipotentiaries, so that this remains, as before, a *quæstio vexata inter gentes*. Grotius, in an oft-quoted passage,¹ divides articles of commerce into three classes with a view to the decision of this question. Arms and implements only of use in war form the first class; and these are undoubtedly contraband. The second class comprises articles of luxury, which are clearly not contraband. The third class is composed of articles *ancipitis usus*, which are of use in peace as well as in carrying on war. Things of this sort are horses, naval stores, provisions, and, since the introduction of steam, coal and steam-engines. Whether or not these articles are to be treated as contraband, is a common subject of treaty. Thus, in our treaty with the United States, dated 19th November 1794, 'Timber for shipbuilding, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted,' are declared contraband. Provisions under this treaty, if taken by either nation as contraband, were to be paid for. Unfortunately this treaty has been dissolved by the war between Great Britain and the United States, and its place has not been supplied by another. This may give rise to grave questions between the two nations, particularly as our Foreign Secretary indicates an inclination to hold only articles included in the first of the Grotian classes as contraband.² This, it is said, is distinctively the French doctrine of contraband, and we have been taunted on the Continent with the change which is assumed to have taken place in our opinions since we were last actively engaged as belligerents in a great maritime war. We cannot believe, however, that British statesmen will for one moment ask greater privileges for this nation when at peace than were accorded by it to neutral states during its wars. As to articles *ancipitis usus*, the practice of our courts has been the very reasonable one of inquiring whether they were in point of fact destined for service in the war or not. If they

¹ De jure, B. et P. iii. 15.

² See Russell's Despatch to Lord Lyons, 23d January 1862; Lawrence's Wheaton, p. 801; also Lawrence's Letter in Law Mag., November 1863.

were, there was an end of the question, and the goods were confiscated as contraband *destinatione*. If they were not, the goods were free. As means of establishing a military destination, besides the conclusive proof often furnished by the peculiar nature of the goods, the character of the port of consignment was looked to. If that port was one of naval or military equipment, like Portsmouth, Brest, or Cherbourg, the goods were condemned; not so if it was a merely commercial port. Even goods contraband *destinatione* were spared by our courts when they were the staple produce of the country from which they were being conveyed.¹ These rules have not been observed in all countries, but they are clearly binding in honour upon Great Britain as established and applied by her tribunals.

But whatever may be the difficulty of defining what articles are contraband of war, the point material to our present inquiry is plain. Contraband of war, though carried in a British ship, and belonging to a British merchant, if on its way to either Federals or Confederates, is subject to capture by the power to which it is *not* consigned.

These then are the two great restrictions upon British trade, imposed by the law of nations, in respect of the civil war in America. If private adventurers who are British subjects send goods to violate the blockade, or convey contraband of war to either belligerent, their property is liable to confiscation upon seizure. This confiscation, of course, is not the act of the cruiser which seizes the goods, but of a Prize Court in the territory of the capturing belligerent, properly established under international law. Where the sentence of such a court expressly states as the ground of its condemnation of the property of British subjects, violation of a blockade or conveyance of contraband of war, this will be *probatio probata* of the cause of loss in any action in Britain upon an insurance of ship or cargo lost. But if the sentence be ambiguous as to the ground of condemnation, our courts, in an action on the policy, will require evidence as to the voyage, and judge for themselves as to the cause of condemnation.²

Undoubtedly it is illegal by the law of nations for Great Britain as a state to violate a blockade, or to convey contraband to a belli-

¹ *The Jonge Margaretha*, Tudor's Leading Cases, p. 732; Manning's Law of Nations, p. 300.

² *Dalglish and Others v. Hodgson*, 7 Bingh. p. 495.

gerent in the present war, and her breach of neutral duties in either of these cases would be a just *casus belli*. But for such private adventures on the part of her subjects Great Britain is not liable to this ultimate penalty of the law of nations. Our business now is to learn whether the laws of this realm regard as illegal, contracts for the doing of that by subjects which international law clearly forbids to the British state. Our authorities are chiefly derived from English law, but we conceive that they may be received without hesitation in Scotland. The legal principle which regulates the question is the same in both ends of the island, and our books are merely defective in instances of its application.

It is, unfortunately, such an unusual thing for this country to be neutral when a great war is in progress, that the writers of our text books have seldom or never contemplated such a contingency. Professor Bell speaks of contracts inconsistent with the national war policy¹ as void; but nowhere do we find mention in this way of our national *neutral* policy. Frequent reference, doubtless, is made in our books to the rights and obligations of neutrals; but we think it will be found upon examination that the writers uniformly had in view the case of Britain being at war. Nor indeed is this curious fact a subject of much wonder, when we remember that from peculiar circumstances, especially in the great struggle with France, this country constantly found itself the asserter of belligerent against neutral rights. The armed neutrality of 1780, the so-called 'Continental system' established by the Berlin Decree of 1806, and that of Milan in 1807, followed in 1807 by our retaliatory Orders in Council, which unhappily produced in 1812 a war with the United States, have left too many traces in our history not to have affected our law books. The knowledge of these facts must teach us caution in consulting our standard authorities; and when we find such a statement as that of Professor Bell,²—'The insurance must be of a lawful subject of trade. Thus smuggled goods cannot be insured, *nor contraband of war*,'—we must not hastily conclude that this was intended to refer to the case of contraband sent from Britain when in a state of neutrality. Another practical reason why so few authorities are to be found on this subject in our books arises from the fact, that when our underwriters knowingly enter into such insurances as we have in view, they consider themselves bound

¹ Comm. (6th Ed.), p. 31.

² Prins. § 460.

in honour to pay without availing themselves of their pleas founded on strict law.

Our most numerous precedents, from the causes just noticed, have reference to insurances upon neutral property effected in this country *when we were at war*. To these, in the first place, we propose to direct attention.

In the time of Lord Mansfield¹ it was held in our courts, that Britain being at war, it was lawful for a British subject to insure goods of the enemy even against British capture. So firmly rooted was this rule, that it was usual in statutes passed for special occasions to exclude expressly its operation. This state of our law was known in France,² and advantage was taken of it by many French subjects during the wars between the two countries. In this way, British subjects often repaired the loss inflicted by British fleets upon the enemy; and the strangeness of this arrangement is not lessened by its having received the unqualified support of Lord Mansfield. The law upon this point was first modified by the case of *Furtado* (a Frenchman) v. *Rodgers*.³ It was there held that indemnity for loss by British capture could not be recovered upon a policy effected in England. Estrangin, the editor of Pothier's *Treatise on Insurance*, feeling jealous, doubtless, of the remarkable respect for engagements implied in the previous state of English law, attempts in a note to show that insurances on French goods against British capture were never held good in England; but he himself states that the defendant in this case of *Furtado* was only one of two underwriters, and that the other not only refused to raise a plea of illegality, but actually paid his share of the loss. There can be little doubt that, apart altogether from the law of nations, the insurance of enemies' goods is a direct breach of our municipal law, amounting even to the treason of lending assistance to the Queen's enemies. The rule as now established, and the reason of it, were well explained by Lord Ellenborough in the subsequent case of *Brandon v. Curling*.⁴ 'The general terms of insurance against capture in our policies,' said his Lordship, 'are to be understood as virtually containing an exception of such captures as might eventually be made by his Majesty and his subjects, and against which a British subject could not, consistently *with his public duty*, insure in direct terms; and consequently, wherever the generality

¹ Marshall on Insurance, p. 22.

³ Bos. and Pul. 191.

² Pothier, *Contrat d'Assurance*, sec. 95.

⁴ 4 East. 410.

of the terms of insurance might produce a similar contravention of public interest, they must be so construed as to exclude the particular event or peril which could not be made the subject of legal insurance in direct terms; and therefore, an insurance on goods generally must be understood with a promise that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the insured and insurer.'

It being in this way settled that insurance upon enemies' goods could not be legally effected in this country, it was an easy step to apply the same principles to the exclusion of insurances upon property of a neutral, intended by him to violate a blockade established by Britain. A British underwriter insuring the goods of a neutral in such circumstances, is helping a stranger to succour the King's enemies and to baffle the exertions of the King's forces. This a British subject is forbidden by the laws of the realm to do, and the insurance is consequently illegal. An insurance of this sort is to be condemned as against the duty of a subject, even more than insurances on neutral goods intended to violate our revenue laws—a statutory prohibition, as of trade with the American colonies—or an embargo imposed by royal authority. In all these cases, insurances effected by the neutral in England have been found illegal,¹ and consequently not actionable in our courts. The like also appears to be the law of America.² Thus, an insurance on neutral goods intended to violate a British blockade is void to all intents, as contrary to the laws of this realm. Certainly the neutral does not violate our laws in his attempt; but as certainly the British insurer does so. The law of nations declares the neutral's goods liable to seizure by the British blockading force; and the law of the realm prevents British subjects from thwarting the national war policy by rendering this international penalty nugatory. The same rule holds as to intended violations of a blockade established by the allies of Britain in a war co-operated in by this country. Such we take to be the law, when the British insurer is informed of the risk intended to be covered; and we think that the same would hold even where he was not informed of the intention to violate our blockade, because the voyage would be one with which he could not legally have anything to do. In the latter case, at any rate, there would be material

¹ *Delmada v. Motteux*, 1 Parke on Insurance, p. 508; *Gibson v. Service*, 5 Taunt. p. 492; *Arnould on Insurance*, p. 707; *Marshall on Insurance*, p. 40.

² Kent's Comm. sec. 262.

concealment, on the part of the assured sufficient to annul the policy.

The same principles apply to the case of contraband of war sent by a neutral to the enemies of Britain. 'All insurances on articles contraband of war are wholly void, and incapable of being enforced in the courts of the belligerent country.'¹ Nay more, 'though the sending of such goods to the King's enemies by the subjects of a neutral power would in them be no offence against the laws of England, yet the insurance of them in this country would not only be void, but highly criminal in every person concerned.'² An insurance of contraband by a British subject is clearly inconsistent with our war policy, by relieving the neutral carrier from the penalties inflicted by our forces.

Altogether different is the position of neutral trade with our enemy's open ports in articles not contraband of war. This country is forbidden by the law of nations to regard such trade as hostile; and no penalties are incurred by a neutral engaged in it. Neutral trade of this description is simply a continuance of a commerce lawful before the war began, and not legally affected by the war, according to the practice of civilised states. This being the case with regard to the trade itself, the accessory contract of insurance stands in the same position in the view of our courts. Bynkershoek for this reason held such insurances valid, though effected in Holland, when that country was at war, on the goods of neutrals.³ Accordingly, it is lawful for a British subject to cover by insurance a neutral trade of this description with our enemies. This was settled distinctly during our wars with France. In one case, *Gist v. Mason*,⁴ which was an action by insurers for premiums of insurance defended on the plea of illegal risk, Lord Mansfield observed: 'This, upon the face of it, is the case of a neutral vessel; and it is nowhere laid down, that policies on neutral property, though bound to an enemy's port, are void.' In the case of an American ship carrying French property and also some American goods to Havre,⁵ Lord Ellenborough held the British insurers liable for loss upon the American goods arising through detention by our forces. 'The American,' his Lordship said, 'was at liberty to pursue his commerce with France, and to be the carrier of goods for French subjects, at the

¹ Arnould on Insurance, p. 740. See also Paton on Insurance, p. 70.

² Marshall on Insurance, p. 55. ³ Quest. Jur. Pub. 1, c. 21.

⁴ T. R. i. p. 48.

⁵ *Barker v. Blakes*, 9 East, p. 283.

risk of having his voyage interrupted by the goods being seized. The indemnity sought under the policy in this case,' he added, 'is not an indemnity to an enemy, or to a neutral forfeiting his neutrality by an act hostilely done by him against the interests of Great Britain, but an indemnity to a neutral, as such, against the consequence of an act innocently and allowably done by him in the exercise of his neutral rights.' If this was the rule when British courts condemned all enemy's property found in neutral ships, much more would the same hold now that the principle of free ship, free goods, has been established by the Declaration of Paris. Even a British subject domiciled in a neutral country may trade with our enemies under the neutral flag, and he may validly insure such trade in this country.¹

Thus, then, it is established that, when Britain is at war, a neutral may insure in this country his trade with our enemies, excepting contraband of war and cargoes destined for a port blockaded by the British forces or by our allies. In this way our courts hold as void, contracts inconsistent with our war policy. It remains to be seen, whether similar rules exist with regard to contracts inconsistent with our neutral policy. We take now, in the second place, the case of *Britain being at peace*, while two powers, such as the Federals and Confederates, are engaged in a war. We assume, in the discussion of this case, that Britain is not expressly bound by treaty with either or both of the belligerents not to send goods to blockaded ports, or contraband of war. If such a treaty existed, we believe it to be tolerably certain that no contracts, whether principal or accessory, entered into in this country between British subjects with a view to its violation, would be sustained in our courts. The same may be said of a contract for the violation of the Foreign Enlistment Act.

The first remark that occurs on this subject seems unquestionably correct, viz., that when the assured has given an express warranty of neutrality, no action would lie against the insurers for loss upon ship or cargo intended to violate a blockade, or upon contraband of war being conveyed to either belligerent. The assured, like the insurer, is a British subject, or at all events a neutral. The existence of an express warranty of neutrality proves not only that the insurer did not know of any premeditated violation of neutrality, but that he was expressly informed that none would be attempted.

¹ Arnould on Insurance, p. 727.

There is thus not only material concealment in itself sufficient to void the contract, but fraudulent misrepresentation which would undoubtedly have that effect.

It appears equally clear that in no view can the insurer be held liable for loss through breach of blockade or carrying contraband, if he was not sufficiently warned of the extra risk on these heads, intended to be covered by the policy. Assuming the insurance of such risks legal, it can only be valid when they have been knowingly undertaken by the insurer. Doubtless his knowledge might be established, not merely by proof of express information, but also by evidence of his acquaintance with circumstances which implied that risk of capture by one of the belligerents was intended to be incurred. But there would be material concealment sufficient to void the policy, were a merchant or shipowner deliberately to keep the insurer in ignorance of the risk of loss by capture for attempted violations of neutrality.

Suppose, however, in the case of capture for breach of blockade, that this penalty was incurred solely by the shipmaster's wilful act, without the instructions of the owners or freighters, though perhaps with a view on his part to their interest; in such circumstances the insurers, though not liable for the consequences of violating the blockade, might be liable to indemnify the owners as for loss through the barratry of the master. It will be remembered that the clause in policies enumerating the risks covered by marine insurance, expressly mentions losses by the barratry of the master and mariners; and this provision has been interpreted so as to give an indemnity to the owners and freighters in the circumstances supposed. Mere ignorance on the part of the master leading to capture of his ship by the blockading force, would not amount to barratry;¹ there must have been an attempt by him wilfully and knowingly to evade the blockade. In former times, the fact of any part of the cargo being contraband, was held sufficient to authorize confiscation of the ship and the remaining cargo, though not belonging to the owners of the contraband.² And in that state of international law, the knowing and wilful reception of contraband by the captain, without the consent of the owner and other freighters, would have been barratry under the policy, on the principle that 'illegal trading, in consequence of which the vessel is seized and condemned,

¹ *Dalglish and Others v. Hodgson*, 7 Bingh. p. 495.

² Paton on Insurance, p. 116.

if knowingly carried on by the captain without the directions, though principally with a view to the benefit, of his owners, is barratry.¹ But in modern international practice, the articles which are contraband are alone liable to seizure, unless the ship or other parts of the cargo belong to the owner of the contraband.² This modern rule practically excludes indemnification for confiscation of contraband on the head of barratry, except in one case. That case is where the contraband is intended by its freighter to be conveyed to a neutral port, and the master, without his consent, though perhaps with the intention of securing a better market, carries the prohibited articles towards the port of a belligerent. In this case the freighter could recover under his policy as for loss by the barratry of the master.

So far the way is clear. The assured, if he shall have given an express warranty of neutrality, or if he shall not have sufficiently warned the insurer of the extra risks, cannot recover for losses upon contraband, or upon goods carried to violate a blockade, unless he establish a case of barratry.

The case, then, which we must now have in view, is that in which the insurer, aware that the ship or cargo is destined to violate a blockade duly established by a belligerent, or that the goods are liable to capture as being contraband of war, has undertaken to cover these extra risks. If the laws of this realm regard these as legal ventures for a British shipowner or merchant, then the accessory contract of insurance is valid. If, on the other hand, such ventures are contrary to our law, action cannot be sustained at the instance of either the insurer or the insured, notwithstanding the express agreement thereto between them. Of course, whatever may be the agreements between individuals, the law will not recognise any insurance upon an unlawful voyage. 'It is a general principle of law, that if a contract be intended to indemnify the owner from loss on property by reason of its being implicated in an illegal trade or applied to an illegal use, or which, according to the laws of the country where the contract is made, it is criminal for the owner to hold, such contract is void; and, accordingly, the owner has no legally insurable interest.'³

It seems clear that if an insurance made expressly upon a voyage in violation of a blockade, or for the conveyance of contraband, is

¹ Arnould on Insurance, p. 824. ² Marshall on Insurance, p. 55.

³ Philips on Insurance (3d edition), sec. 214.

illegal by our law, the insured would have no action against the insurer for indemnity against even the ordinary sea-risks. Thus, supposing such voyages illegal, if a ship carrying contraband to a belligerent were to founder at sea, the insured would have no action. From the cases of *Furtado v. Rodgers*, and *Brandon v. Curling* (above noticed), it might be inferred that a British policy on enemy's property, though illegal and invalid as covering risk of British capture, would be good as regards other ordinary risks. But this doctrine, if ever entertained, seems now to be abandoned; and it is held, that 'where the policy is thus avoided in consequence of the illegality of the risk, the underwriter is entirely discharged from all liability, and this, although he himself was aware of the illegal nature of the adventure.'¹

Although, as already observed, from the rarity of this country being neutral while a great war was going on, our books do not contain many express provisions for such circumstances, still there are some cases in which insurance on ship and cargo destined to run a blockade has been held illegal. There are four cases which have been much referred to in the English courts as indirect authorities upon this point. Of these, two are cases of neutral vessels captured in attempting to violate the blockade of Amsterdam, established by this country when at war with France—viz., the '*Hurtige Hane*,'² belonging to a subject of the Barbary States, and the '*Adelaide*,'³ a ship of Bremen; and two relate to attempted violations of a blockade of Havre—the '*Shepherdess*,'⁴ and '*Neptunus*,'⁵ both American vessels. Three of these vessels were condemned by Sir William Scott; but the fourth, the '*Neptunus*,' escaped under a distinction taken by the same judge between a formally notified blockade and a blockade merely existing *de facto*. These cases are generally referred to on account of expressions used in them by that eminent judge, to the effect that it is *illegal* for a neutral vessel to attempt the evasion of a proper blockade. But we rather think that not much weight can be attached to this use of the term illegal in considering the question, whether it is contrary to the laws of this realm for a British subject, being a neutral, to engage in an attempt to violate a blockade. Lord Stowell cannot be fairly held as meaning, by such expressions, more than that the acts of the neutrals were contrary to the law of nations. In another case, that of the

¹ Arnould on Insurance, p. 740; Marshall, p. 41.

² 3 Rob. Ad. Rep. p. 324.

³ 2 Rob. p. 111.

⁴ 5 Rob. 262.

⁵ 2 Rob. 110.

'Tutela,'¹ which came before the same judge, there is an opinion expressed by him which approaches a little more nearly the point we have in view. This was the case of a neutral ship captured while running into St Lucar, in violation of the British blockade of that port. The master attempted to excuse himself by explaining that he had signed a charter-party in France for St Lucar before the blockade legally commenced, and that after the blockade was known he was compelled by the freighter, contrary to his remonstrances, to sail for the blockaded port. Lord Stowell held this no excuse, on the ground that by the supervening blockade the intended voyage had become *illegal*, and, consequently, not compulsory under the charter-party. 'As in all other contracts,' said his Lordship, 'that become illegal, he might have protested against being any longer bound by his charter-party.' If this opinion is in the circumstances to be received as an authority, it only shows that a charter-party entered into in ignorance of a blockade cannot be enforced against the shipowner in the event of the subsequent existence or notification of a blockade. This is an accepted rule in regard to charter-parties both in England² and in the United States;³ but we doubt whether it necessarily implies that the intended voyage becomes by the laws of the realm illegal, although it is generally explained by reference to that principle. It may be said that there is an entire change of circumstances in the case of such a charter-party, and that it would be glaringly unjust to insist that the shipowner shall, a blockade having supervened, cause his property to run a definite risk which was not contemplated and provided for when the charter-party was entered into. In this way the rule of freedom from a charter-party, after notification of a blockade, may perhaps be supported without help from the general principle that a voyage by a neutral in violation of a blockade is illegal by the laws of the neutral state. Indeed there is a case in the English books, which at first sight seems to rest the rule entirely on the change of circumstances after the charter-party was signed, and to negative the idea of a supervening illegality. The case to which we refer is that of *Medeiros v. Hill*,⁴ and it is thus epitomized by the reporter: 'It is no defence to an action on a charter-party for not sailing on the voyage towards a port agreed

¹ 6 Rob. p. 177.

² Abbott on Shipping, p. 431.

³ *Scott v. Libby and Others*, Aug. 1807, Johnson's Americ. Rep. ii. p. 336.

⁴ Bingham, Rep. viii. p. 231.

on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charter-party.' According to this reading of the case, it would be perfectly legal for British subjects, being neutrals, to enter into a charter-party with a view to violate a blockade established by a foreign power; the only difficulty would be to show that the owner knew and undertook the risk. But upon examining the case, it will, we think, be found to be an authority for the conclusion that such a contract is illegal in England. The defendant, a British shipowner, this country being neutral, had entered into a charter-party with the plaintiff to send a ship to Terceira, then *blockaded* under a duly notified blockade by Portugal. Before the charter-party was signed, it was found that the blockade had ceased to be real or effective. The defendant failed to send his ship, and this was an action for breach of contract. The defendant's pleas were, (1) that the intended voyage was unlawful in respect Terceira was blockaded; and (2) that, supposing the voyage not strictly unlawful, the blockade was a sufficient excuse for non-performance. The opinion of the Court was delivered by Tindal, C. J. In reference to the first plea, the Court distinctly held that a voyage with a view to violate a blockade was illegal. 'The case of the "*Neptunus*,"' it was said, 'which was cited in support of the first objection, establishes that it is illegal to attempt to enter a blockaded port in violation of the blockade, and that after notification of the blockade the act of sailing to a blockaded port with the intention of violating the blockade is in itself illegal.' This was the law as laid down by the Court, but it was not applied in this case, because it was held that there had been no premeditated intention of violating the blockade, and that no blockade legally existed, since it had ceased to be real and effective before the charter-party was completed. On the second objection it was observed by the Court, that as the parties equally knew of the blockade, no plea could be founded upon it to avoid the contract. Judgment was therefore given for the plaintiffs. If, then, we understand this case aright, it is an authority for the proposition, that when Britain is neutral, a voyage projected by a British subject in violation of a blockade is illegal by the laws of the realm. Still more direct precedents arose out of the blockade by Brazil of the ports in the River Plate belonging to the government of Buenos Ayres. This blockade, which was intimated in the *Gazette* on 18th February 1826, gave rise, before it ceased on 1st October

1828, to many ventures for its evasion on the part of British subjects, and some policies upon these ventures formed the subject of adjudication in England. *Naylor and Others v. Taylor*,¹ *Dalgleish and Others v. Hodgson*,² and *Harratt v. Wise*,³ were actions at the instance of the insured to recover under such policies, for losses through capture of British ships and cargoes by the Brazilian blockading squadron. In not one of these cases, it is true, were the insurers held free from liability, but in each the Court distinctly laid down the general rule of the illegality of such ventures, and consequently of the insurances upon them. In each case this rule was not applied, simply because it was held not proven, that there was in point of fact any intention to violate the blockade. In the first of these cases, for instance, it was stated by Lord Tenterden, 'The vessel might have sailed for Buenos Ayres without contravening the law of nations, provided it was a part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country.' This was held to have been the true intention of the parties; but if they had clearly devised a violation of the blockade, it was intimated that the laws of this realm would have followed the law of nations in declaring the voyage and the insurance upon it illegal. It must be remembered that the proof of knowledge of the blockade and intention to violate, is different according as the question is between merchant and insurer, or between belligerents and neutrals. In the former case there is no room for the presumptions which have been established for the benefit of belligerents, and the knowledge and illegal intention of the insured is simply a question of fact, to be settled by a proof at large in each particular suit. Doubtless very lenient views were taken of the facts in the cases above cited; but this does not, on a fair construction of these cases, detract from the validity of the legal propositions there asserted by the judges. When facts amounting to a premeditated violation of a blockade shall be brought before our courts, they must hold as illegal any insurance effected to cover the risks attendant upon the violation, unless they repudiate entirely the principles upon which the case of *Medeiros v. Hill*, and the cases as to the Brazilian blockade, were decided.

So much for the case of a British ship or cargo destined to run a

¹ Barn. and Cressw. ix. p. 718.

² Bingham. vii. p. 495.

³ Barn. and Cressw. ix. p. 712.

blockade established by a foreign belligerent. If we are right in our construction of the authorities, which is that adopted by an eminent American writer (Duer on Insurance, i. p. 754), an insurance upon such a venture is illegal and invalid to all intents. The assured could not recover even for ordinary losses unconnected with international law, nor, if the premiums were paid to the insurer, could repetition be sought, because *in pari delicto melior est conditio possidentis*. We now turn to the case of contraband of war shipped by a British subject to a belligerent, and insured in this country.

On this point we have been unable to find any decision either in England or in Scotland. One writer on insurance¹ intimates that the insurance on contraband might be valid in the courts of the neutral country; but as he grounds this statement solely on a passage in the work of the American Chancellor Kent,² to which we shall afterwards refer, it cannot be taken as a statement of the law of England. The general principle of English law, as enunciated by Arnould,³ is that 'no species of property or interest on a sea venture can be the subject of a valid contract of marine insurance, if the course of trade, or the voyage in the prosecution of which it is so exposed to risk, be in contravention either of the laws of the land or the laws of nations.' Similar passages are to be found in Marshall,⁴ equally recognising the invalidity of a policy designed to cover risks incurred through violation of the law of nations. These authors thus proceed on the assumption that our law would not support any action founded on an attempted violation of international law. The same doctrine may be evolved, though rather circuitously, from the case of *Madrazo v. Willes*.⁵ It was there held, that a foreigner not prohibited by the laws of his own country to carry slaves from Africa, who was interrupted in his nefarious trade by British subjects, was entitled to an action of damages in England against those who interfered with him. The decision, however, proceeded on the ground that the slave trade was not abolished by the law of nations; so that, if international law had then declared the slave trade illegal, our courts would have recognised the provision to the effect of excluding the plaintiff from his suit. We must then consider the legality of insurance on contraband of war as an open question in this country; and so, we believe, it is regarded in both ends of the

¹ Arnould, p. 740.

² Comm., ed. 1844, vol. iii. p. 267.

³ p. 736.

⁴ pp. 37 and 41.

⁵ 3 B. and Ald. p. 353.

island, though the bias of opinion in Westminster Hall is said to be in favour of its legality. We have, however, this principle to guide us in coming to a conclusion upon it, that if the **SENDING** of contraband by a neutral to a belligerent is truly forbidden by the law of nations, our courts would regard the trade as illegal, and consequently hold any insurance upon it invalid. Such, at least, appears to be the principle recognised by our best writers on insurance; but it is proper to remember, as throwing some light on the question, that, rightly or wrongly, a very different principle has been established in our courts in regard to foreign revenue laws. Contracts with a view to violating the revenue laws of a foreign state may be legally made in Great Britain, and insurances to cover such questionable ventures are perfectly valid, provided that the underwriters were fully informed of the nature of the risk.¹ Whatever may be said in vindication of this established rule of our law—and we think very little can be said with justice—no one will surely think of arguing from it that our courts in the same manner ought to support contracts made with the deliberate intention to violate any distinct prohibition of international law. The law of nations clearly is not a foreign law in any sense, and cannot be treated as such by our courts. Indeed, in at least one class of cases, the English courts have distinctly refused to sustain as legal, contracts made in this country with a view to the violation of obligations imposed upon it by the law of nations. The cases to which we refer are those arising out of loans made, or expenses incurred, to assist insurgents against governments at peace with ours. This assistance is plainly contrary to our duty as neutrals, and has uniformly been treated as unlawful by our courts.² The law of nations rests either upon express treaties, which are its statutes, or on the customs of civilised nations, which are its unwritten law. A violation of international law by British subjects is thus equivalent to a breach of agreements, express or tacit, to which this nation is a party. It is true that the great name of Lord Mansfield can be quoted for the legality of a British trade, not only contrary to the revenue laws of a foreign state, but to the express provisions of a treaty to which Great Britain was a party. But Lord Stowell surely indicated the just rule when he said, ‘Every treaty is part of the private law of each of

¹ Arnould on Insurance, pp. 707, 789; Marshall on Insurance, p. 45. See Pothier, *Contrat d'Assurance*, sec. 58, against, and Estrangin, in a note to this passage, for this rule.

² Westlake, *Private International Law*, sec. 199; Tudor, *L. C.* p. 234.

the countries which are parties to it, and is as binding on the subjects of each as any part of their own municipal laws,¹ and it is upon this principle that our courts may be expected to act in adjudicating upon contracts made in violation of international law. That what has become unlawful by the law of nations, cannot be lawfully done by the subjects of any particular state, is accordingly the rule now recognised in England.² We hold, then, that the validity of insurances upon contraband of war, according to the laws of this realm, will depend upon whether or not these insurances are connected with a trade forbidden by international law.

It is said that in Prussia, Sweden, Hamburg, and Amsterdam, neutral insurances on contraband are held valid (Duer, i. p. 759). In America, the rule that courts of law will support a contract made with a view to violate the revenue laws of a foreign country, 'has become an established formulary of the jurisprudence of the common law,'³ though not without energetic protests by eminent jurists, and in particular by Mr Justice Story.⁴ It was at one time also distinctly maintained by American jurists, and supported by decisions in some courts, that trade in contraband of war is legal, and may be legally insured in a neutral country; and this upon the principle, that international law does *not* forbid to a neutral the sending of contraband, but merely renders it liable, if sent, to seizure. 'It was contended,' says Kent,⁵ 'on the part of the French nation in 1796, that neutral governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent powers. But it was successfully shown on the part of the United States, that neutrals may lawfully sell at home to a belligerent purchaser, or carry themselves to the belligerent powers, contraband articles, subject to the right of seizure *in transitu*. This right has since been expressly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile power to seize, are conflicting rights, and neither party can charge the other with a criminal act.' The necessary conclusion from this view of international obligations—rather an inconvenient one in the present circumstances of the States—was that insurance upon contraband is legal; and this is expressly stated by the same learned author in a subsequent passage. 'The insurance by a neutral of goods usually

¹ The 'Eurom,' 2 Rob. p. 6.

² Conflict of Laws, sec. 245.

³ Comm. sec. 142.

⁴ Marshall on Insurance, p. 56.

⁵ Treatise on Contracts, sec. 585.

denominated contraband of war is a valid contract; for it is not deemed unlawful for a neutral to be engaged in a contraband trade. It is a commercial adventure which no neutral nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation.¹ 'There is nothing,' said Mr Justice Story in the famous case of the '*Santissima Trinidad*,'² 'in our laws, or in the law of nations, that forbids our citizens from sending armed vessels as well as munition of war to foreign ports for sale.' Nay further, though without the concurrence of Kent, and apparently without the authority of a decision, one American writer has extended the same views to the case of a neutral ship or cargo destined to a blockaded port. International law, according to this writer,³ in the case of violation of blockade as in that of contraband, does not forbid the trade, but merely imposes the penalty of confiscation in the event of seizure. These American opinions, even the most extreme, thus proceed upon a peculiar view of the requirements of international law. If the law of nations not only imposes the penalty of confiscation, but absolutely forbids neutral trade in contraband of war, as it certainly does neutral trade in violation of a blockade,⁴ there can be no doubt, even on American principles, that contraband trade is unlawful, and cannot be insured. In a note to the edition of his Commentaries published in 1854, Kent has intimated a modification of his views upon this point. 'But though,' he says, 'the better opinion on sound doctrine be that such a trade is unlawful for a neutral, yet it is the prevalent rule in *Continental Europe* that an insurance made in a neutral country on articles contraband of war, and destined to a belligerent power, is permitted; and this seems to be an exception to the general principle, that an insurance in a neutral country on a trade prohibited by the law of nations is illegal and void.' In a subsequent passage in the same note, he states that the validity of such an insurance must be regarded as still an open question in America as well as in England, and in this he is followed by his disciple and friend Mr Duer. The latter writer argues clearly and forcibly against insurance on contraband, and rests its sole claim to validity on the 'general usage of commercial nations'—a usage which, if it exists, is merely local and municipal, and which therefore, surely, can afford no rule for us. (See Duer's *Marine Insurance*, i. p. 748 et seq.)

¹ Kent, Comm. sec. 268.

² Philips on Insurance, sec. 282.

³ 7 Wheat. Americ. Rep. p. 340.

⁴ Marshall on Insurance, p. 56.

The decision of this question, according to the authorities, English and American, depends upon two points: (1st) Is it the law of nations that a neutral shall not interfere between two belligerent powers, and in particular that a neutral shall not carry to either party under his own flag, nor send under a belligerent flag, articles which are contraband of war? (2d) Supposing the first question answered in the affirmative, do the laws of this realm regard as unlawful a trade in contraband declared by the law of nations to be unlawful? The second question presents little difficulty, and is indeed tacitly assumed by the authorities.

Now, in regard to the first of these questions, there can be no doubt, as we saw in the commencement of this article, that international law gives to the belligerent whose interests are endangered the right of seizing and confiscating contraband of war in the circumstances supposed. There is also certainly an obligation upon the neutral to submit to such seizure and confiscation. According to the doctrine at one time maintained by Americans, international law establishes no more than a right in the belligerent to seize, and a correlative obligation on the neutral to submit; it still recognises a right in the neutral to trade in contraband with the belligerents out of the neutral territory. This view of a sort of conflict of rights between belligerents and neutrals, appears to some extent to have the approval of 'Historicus,' in his well-known Letters on Neutral Trade in Contraband of War. But we think that this doctrine is self-contradictory, as well as inconsistent with international law. If it is lawful for a neutral to trade in contraband, why are such articles seized? If it is lawful to seize contraband, though the property of a neutral, how can it be lawful for him to trade in it? A conflict of substantial and important rights, such as is supposed, occurs only when the nations' claimants are at war for their rights, and it is truly irreconcilable with the existence of neutrality. As a point of scientific legal analysis alone, a conflict may be figured to exist between the right of the neutral to trade, and the right of the belligerent to non-interference. But the latter meets, overcomes, and extinguishes the former *pendente bello*, in regard to contraband of war. International law does not allow a neutral to extend a trade in contraband beyond his own territory. It imposes upon him absolutely the obligation of non-interference—of strict neutrality, and protects him and his trade from all molestation by the belligerents under these conditions. It declares, rightly or wrongly, a trade in

contraband with either belligerent a breach of his duty as a neutral, and for that reason, subjects his property, while *in transitu*, to seizure by the injured belligerent. The contraband trade of a neutral is contrary to international law, and therefore deprived of its protection. We do not think it necessary to cite many authorities to prove the unlawfulness of trade in contraband of war, as distinguished from its mere liability to interruption and seizure by the aggrieved belligerent. Surely a trade subject by law to penalties, even if not prohibited in direct terms, is illegal. Bynkershoek¹ always alludes to trade in contraband and trade with a blockaded port as alike unlawful to neutrals, because alike breaches of neutral duties. Such was distinctly the view formerly established in this country. Neutrals by sending contraband become accessories to the war, and this accession is a delinquency, which is the ground of justice for confiscating their obnoxious goods. (See Stair, Inst. ii. 27; More's Notes, p. 152.) The same view is maintained in a late English work of practice;² and an English writer on the Law of Nations explains, that freight is not allowed by the captor to the ship carrying articles of contraband which are seized by a belligerent, because the carrying articles of contraband to a belligerent is reckoned as a *WRONG* to the other belligerent.³ By continental jurists neutral trade in contraband is regarded as an absolutely prohibited and punishable trade, and formerly the parties concerned were liable to severe personal punishment.⁴ Even at the present day, as we have seen, there may be seizure by way of punishment *ob contingentiam delicti*. But in fact the plainest possible statement of the unlawfulness of neutral trade in contraband, is to be found in one of the American writers on insurance already referred to. 'The law of nations makes it the duty of a nation professing to be neutral to abstain from assisting either belligerent to carry on a war, by furnishing soldiers, ships of war, arms, or warlike stores.'⁵ We hold, then, that the law of nations prohibits to a neutral all interference between two belligerent powers; and in particular, declares unlawful, beyond the limits of his own territory, his trade in contraband of war with either belligerent.

That being the case, in order to decide whether an insurance upon such contraband trade is unlawful, we have only to consider whether the laws of this realm hold that trade unlawful. Now, by

¹ Quest Jur. Pub. i. c. 11; see also i. c. 19.

² Tudor's Leading Cases, pp. 737, 757. See also Paton on Insurance, p. 115.

³ Manning, p. 309.

⁴ Heffter Völkerrecht, secs. 160, 161.

⁵ Phillips on Insurance, sec. 270; see also secs. 271, 276.

a fundamental though unwritten law of this realm, every subject has a right to the protection of his person and property by the whole power of the state, especially against the attacks of foreigners. The condition of the continuance of this protection is his obedience to the laws; and so long as he is faithful in this respect, that protection cannot be legally withheld. Now, as we have seen, the sovereign of this country has expressly withdrawn the national protection from all property of her subjects coming under the denomination of contraband of war *in transitu* to either belligerent in the present contest. This is undoubtedly a legal withdrawal; but why so? Only because the trade in question is unlawful by international law. Thus the laws of this realm recognise and adopt the law of nations to the effect of depriving the subject of his otherwise legal right of protection. Our laws, in fact, by the Royal Proclamation, warn the subject that during this war he shall forfeit his legal rights in regard to his property if embarked in a specified trade. We do not overstrain the legal significance of these facts by holding them to amount substantially to a declaration that the specified trade is unlawful according to the laws of this realm. A right which these laws confer can be limited or taken away by these laws alone. The present is, in truth, a case not of the conflict, but of the subordination of laws. If international law is not a mere name, it must occupy, relative to the municipal laws of each state, a position analogous, but not identical with that in which the common law of a country stands to the rules of a great corporation, as, *e.g.*, a church established in it. Municipal law, as the institutes of only one state, cannot hold lawful that which international law, proceeding from the whole community of civilised states, declares to be unlawful. Consistently with this view, Blackstone¹ observes, in treating of the royal power to limit the rights of the subject by proclamation or otherwise: 'But since in England no royal power can introduce a new law or suspend the execution of the old, therefore the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and held to be the law of the land.' This passage is directly applicable to the case of contraband trade, and, taken along with the opinions of other legal writers which have already incidentally come under our notice, it seems quite conclusive on our present question. Take even a low, and as we think erroneous, view of what is termed international law,

¹ Stephen's Ed., iv. p. 296.

and recognise in it no law at all, properly speaking, but only a collection of treaties and of customs dependent for their efficacy on the principle of doing as we have been and would be done by.¹ Even in this case, contracts contrary to the customs relative to contraband should be held illegal by the laws of this realm, as contrary to our national neutral policy. A contraband trade which would be clearly contrary to good faith and policy if carried on under the auspices of the executive, does not change its character when carried on by subjects under the recognition and support of the judicial power of the state. From any point of view, the conclusion seems inevitable, that since trade in contraband of war is unlawful by international law, it is also unlawful in the eye of our municipal law, to the effect of depriving it of protection, though not of exposing it to punishment by our municipal tribunals. This being so, insurance upon that trade is illegal, and could support no action whatever in our courts; for 'it would be singular if the original contract being invalid and incapable to be enforced, a collateral contract founded upon it could be enforced.'² Altogether independent of our previous discussion of this point, and as confirmatory of the conclusion to which we have now arrived, it seems to us not at all unreasonable to hold it as truly coming under precisely the same principle which fixes the invalidity of insurances upon goods intended to violate a blockade. Few or none who have treated of the subject question the invalidity of insurances upon blockade-runners; and the argument to support insurance upon contraband rests upon an attempt to show that international law places the sending of contraband and the violation of blockade in different categories. We confess ourselves unable to accede to this view of international law. We believe that the seizure of goods sent in violation of a blockade and by way of contraband, is lawful *eadem plane ratione*, as being both alike acts of accession to the war and violations of the neutral's duty of non-interference. This is expressly laid down and explained by Bynkershoek, in a passage too long for quotation. 2 J. P. i. c. 11.

This, then, completes our task. We cordially agree with those who think that all restrictions upon trade in contraband by neutrals should be dispensed with, provided that no sanction was given to the actual fitting out of warlike expeditions upon neutral territory. But into the propriety of this reform, of the abolition of commercial blockades, or of conferring an immunity from capture upon all

¹ Story's Conflict of Laws, sec. 35.

² Arnould on Insur. p. 699.

private property at sea, even though belonging to a belligerent, as was proposed in President Pierce's message to Congress in December 1856, it would here be out of place to enter. It is enough for the purpose we had in view to be now in a position to reply to the question with which we commenced this paper—Action would *not* be sustained in our courts upon a contract of insurance covering contraband of war to be conveyed to either belligerent, or a ship and cargo intended to violate the blockade.

THE LAND REGISTERS.

Report of the Committee on Bills of the Society of Writers to Her Majesty's Signet, on Report of Commissioners appointed to inquire as to State of Land Registers in Scotland.

IN a recent number we brought under the notice of our readers a suggestion emanating from the Faculty of Procurators, to the effect that the registers of large urban districts (of which the Regality of Glasgow is the most important example) should be considered as burgh registers, and be retained in the locality to which they relate. We observe that the Society of Writers to the Signet, as represented by their Committee on Bills, do not approve of this suggestion; but, on the contrary, express their decided opposition to any extension of the local registers, although they are willing that the existing registers of that description should continue to be kept in the locality, as proposed in the Report of the Royal Commission. It is a fair question for consideration, whether the burgh registers should be allowed to retain their local character, or should not rather be dealt with on the same principle as the Particular Registers for counties and combinations of counties. But if there are to be separate local registers for royal burghs, it is desirable that those districts should all be dealt with on the same principle. The Regality District Register, although not technically a burgh register, is so in the sense in which the Commissioners propose to continue those registers—that is, as urban registers, applicable to feudal as well as to burgh subjects.

It is not our present intention to resume the consideration of the subject of the consolidation of the General and Particular Registers. We understand that a bill is soon to be introduced, embodying some of the more important recommendations of the Commissioners; and

after that measure has been tabled, we may take another opportunity of adverting to the subject. But there are other questions, of great interest and importance, upon which the Committee of the Writers to the Signet and the Royal Commissioners are at issue; and as the Report of the former body may not be in as extensive circulation as its importance deserves, we believe the objects which the Society have in view, and in which we in the main concur, may, in the present stage of the question, be better advanced by merely summarizing and explaining the recommendations of the Report, than by offering any lengthened criticism upon it.

The first subject upon which the Committee dissent from the Report of the Commissioners relates to the proposed subdivision of the index to the register into parishes, with the view of restricting the area of search, and thus superseding the dormant index of places. The Committee say—

‘The Commissioners have, however, endeavoured, without making a greater subdivision of the register than into counties, to restrict the area of search by the aid of a farther subdivision of the county index. Your Committee are quite sensible of the advantage of limitation of the area of search, but they are satisfied that, for practical purposes of search, the subdivision into counties will be found sufficient; indeed, that in many of the counties of Scotland a search in the county register will be very simple. In some of the larger counties, it is true, difficulties may be experienced in making searches expeditiously and economically; and it is with a view to obviate these that the Commissioners, in an after part of their Report, have suggested the formation of what they call a “Parish Index.” Such an index, if complete, would undoubtedly afford great facilities for searching; and in order to perfect such an index, the Commissioners have suggested a provision which your Committee regard as open to serious objection. They propose, notwithstanding the difficulties which present themselves, to make it imperative to insert in the deed to be registered the name of the parish in which the lands are situated, *as a condition of registration*. They say, “Some deeds, we are aware, do not at present mention the parish; and to meet that case, we propose to make the insertion of the name of the parish in a deed an indispensable requisite of its registration. It is not necessary, for securing this, that a deed in which the parish is omitted should be declared null. The keeper of the register might be enjoined to refuse its registration till the party offering it should supply the defect by endorsing upon it a warrant, declaring the parish, similar to the warrant of registration now in use; and the validity of the registration might be made dependent upon the correctness of the deed or warrant in this respect.” It is known to the members of the Society how difficult it often is—cases, indeed, occur where it is practically impossible—to state with accuracy the parish or parishes in which the different portions of an estate are situated; and your Committee cannot approve of a provision under which registration, although duly completed in the appropriate register, shall be declared null in respect of inaccuracy in such a matter. The increased facility for searching afforded by a parish index would, in the opinion of your Committee, be dearly purchased at such a cost. The proposal of the Commissioners involves additional duty on the keeper of the register, and additional responsibility on the agent; the object in view does not seem to warrant the imposition of either. It is not, in the opinion of your Committee, expedient, without great and manifest benefit, to lay upon the keeper any duty, the performance of which may interrupt the

business of registration. When the deed presented is simple, and the lands shortly described and in a single parish, the keeper may be able, without much loss of time, to ascertain the observance or non-observance of the proposed statutory requirement; but when the lands are in different parishes, and the description of them is involved, much time may be spent, without the keeper being able to satisfy himself that there is full and accurate specification of the parishes. The Commissioners do not indicate whether, during the examination necessary to satisfy the keeper, the *position* of the deed in the register is to remain in suspense, or the actual business of registration is to be interrupted. It seems to your Committee that the practical result of such a provision as that proposed by the Commissioners would be, that in all cases, except those in which there was no mention of any parish, the deed presented would be received by the keeper, and the whole responsibility would rest with the agent presenting it. Professional responsibilities are already sufficiently onerous without adding another of a character so serious.'

There is much force in the following observations of the Committee, deprecating imperative legislation on the subject of the transmission of deeds for registration by post:—

'While your Committee quite approve of the view of the Commissioners, that the intervention of an Edinburgh agent in the registration of writs sent from the country shall not be necessary, it appears to them that this is one of the cases in which, to use the words of the Commissioners, "we must be on our guard not to disturb unnecessarily that which is, on the whole, working well," and that *statutory* regulation of it is not expedient. For many years the practice has existed, to a large extent, in almost all parts of the country, of transmitting writs by post to the keeper of the General Register of Sasines in Edinburgh. The Commissioners state, not only that there is no complaint of the working of this arrangement, but that not a single instance has occurred in which there has been any miscarriage. The keeper has caused to be presented, and has registered in due course, every writ so transmitted, and has acknowledged receipt whenever asked to do so, which, however, occurs in comparatively few instances. This system is attended with considerable advantages. Many writs are transmitted by post wanting warrants of registration, or with imperfect warrants, or otherwise unfit for registration; and the keeper, acting on his own discretion, unfettered by statutory obligation binding him to perform the duty regardless of consequences, is able, without incurring personal responsibility, to send back such writs unregistered to the senders, who do what is necessary to cure the defects pointed out to them, and afterwards return them to be registered. The expense and trouble of abortive registration has thus been saved to all parties; and as the writs received by post when the registers are consolidated, will, of course, be very greatly more numerous, the advantages of the existing arrangements will then be experienced still more widely. Considering that, when writs are returned by post, the keeper has no receipt from the sender, the latter has little reason to complain if he obtain a receipt whenever he requires it; and if an obligation to grant receipts be imposed upon the keeper, he must be entitled to exact them, which could not well be arranged without practical inconvenience. It has been suggested, in regard to writs transmitted by post to the keeper, that cases of difficulty may occur in entering writs affecting the same property received by him simultaneously. Your Committee are informed that no such difficulty has in practice occurred; and the only hardship (if it can be so called) involved in the maintenance of the existing arrangements, would be that, in cases of expected competition, it would be necessary for an agent not resident in Edinburgh to employ some one—but not necessarily a professional man—in Edinburgh, to lodge his deed for registration. On the whole, your Committee recommend that the existing arrangements, in regard to writs transmitted by post, be not interfered with.'

While admitting the force of the considerations advanced in the passage we have quoted, we have no hesitation in saying that the local practitioners are entitled to a guarantee that the discontinuance of the local registers shall not have the effect of depriving them of this part of their business, and it seems to us that such a guarantee can only be effectually given by an enactment of the Legislature. It does not follow that a deed defective in the warrant of registration must necessarily be engrossed in the register *periculo petentis*. All that is necessary to secure priority is presentation. Power might be given to the keeper of the records to retransmit a deed for correction of the warrant after having entered it in the presentation book. If the agent, on consideration, should think the warrant sufficient, the record would bear to be of the date of first presentation. If the deed was returned in an amended form, the original entry would be cancelled, and it would be registered as of the date when it was returned.

We agree with the Writers' Committee in thinking that a Sundries Counties Register is objectionable, and concur in their suggestion that the deed should be recorded in full in one county register, to be specified by the agent on presentation, and that a minute only should be entered in the books for the other counties.

The next topic of importance dealt with in the Committee's Report, is that of the index of places, which, notwithstanding the difficulty of compiling it, and the little use that can be made of it when compiled, is still, in the opinion of the Committee, essential to the completeness and efficiency of our system of records:—

‘The Society are aware that the late Mr Thomas Thomson, to whom Scotland stands so much indebted in connection with the registration of land rights, regarded an index of places as an essential feature of a perfect system of indexes. Such an index has been completed from the year 1780 to the year 1830, when it was discontinued. The labour of constructing that index had become considerable; but its discontinuance was the result, not of this difficulty, but of the anxiety felt to push forward the abridgment of the sasines and index of persons. In both these works, although not yet completed, the progress has been very considerable; and your Committee cannot concur with the Commissioners in holding that the completion of the index of places should be abandoned as impracticable. On the contrary, they attach the greatest weight to the opinion of Mr Thomson, as stated by the Commissioners, that “an index of places, or an index having reference to the lands, in addition to an index of persons, is indispensable.” At present searches are conducted by means of the index of persons in connection with the abridgments of sasines; but the Commissioners have themselves adverted to the radical defect involved in a search by an index of persons only,—namely, that such a search cannot be relied upon, *except* where the searcher is informed of the names of *all* the persons connected with the ownership of the property during the entire period of search. It is manifest that so imperfect a system of indexing could not be adopted in any per-

nament arrangement; and accordingly the Commissioners have suggested the "parish index," to which your Committee have already adverted. That index is intended to come in place of the index of places, and is represented as fitted to accomplish all the objects of that index. To the "parish index" your Committee have already stated objections which they regard as fatal; but apart from these, it is quite evident that such an index cannot supply the want of an index of places. The proposed "parish index" is nothing more than an "index of persons" with a more limited area than the existing index of persons,—the one embracing the persons within a county, the other the persons within a parish. No search against *the lands themselves*, which is the distinctive object of an index of places, can be made by either of these indexes, unless by collating *every entry without exception* contained in the entire index.

Except on the assumption that the "parish index" suggested by the Commissioners is to be introduced, it does not appear that they would have proposed the abandonment of the "index of places." Be this as it may, however, your Committee are clearly of opinion that it ought not to be abandoned, but should, on the contrary, in future be prepared along with the "index of persons" contemporaneously with the record. It is a mistake to suppose that this cannot be effected, or can only be effected at great expense. Though only a very moderate outlay has ever been expended on the index department of the register of sasines, there were actually framed, between 1821 and 1858, printed abridgments and manuscript indexes of persons for the entire period from 1781 to 1850 inclusive, and manuscript indexes of places for the period from 1781 to 1830 inclusive. While the registers were scattered over the length and breadth of Scotland, and could only be collected together in cycles of five or ten years, it was of course impossible to have them annually indexed; and latterly the limited funds allowed for the purpose, notwithstanding the large surplus revenue of the register of sasines, did not admit of the plan of Mr Thomson being carried out in its integrity; but that it *can* be carried out, and at no great expense, is evidenced by the past history of the index department. It has, however, been represented to the Commissioners, and unfortunately they have adopted the statement, that the "index of places" is of no material use. From this view your Committee must dissent. They consider that no system of search can be complete or safe that does not comprehend the use of an index of places, or, in other words, the means of searching against the *lands*, as well as the owners. In those cases in which the searcher cannot be supplied with correct information as to all the persons who, during the entire period of the search, have been connected with the ownership of the property, an "index of persons" is admitted, on all hands, not to afford the means of making a search that can be safely relied upon. In all such cases an index of places is the only safe guide to the state of the records. To surrender that guide, and establish, as a general arrangement, a system under which the register of land rights must be admitted to be incapable of being safely searched, unless where the owners of the property during the whole period of search can be pointed out, would, in the opinion of your Committee, be to attach very serious and unnecessary discredit to the records of the country.

Great stress has been laid upon a class of cases in which the entries, in registered writs, of vague or general descriptive names of places—such as "tenement in Gorbals"—or the very frequent recurrence of the same or similar names, renders a search of the register by means of an index of places very laborious and tedious. The obvious answer to this is, that where, in that class of cases, the searcher is well assured that he possesses the information that renders it safe for him to search by the index of persons alone, it is open to him to do so; otherwise, a search can only be made by the index of places, and the trouble of consulting it *must* be undergone. But surely the existence of such a class of cases—quite exceptional—is no good ground for the surrender by the country at large of the only safe guide to the state of the records.

On the whole, your Committee recommend that the Society should enter a

decided protest against the abandonment of the index of places, and express their opinion that that index, and the index of persons, and printed abridgments, should, as well as the minute book, be in future all prepared contemporaneously with the record; and that the index of places should be brought up to date, as speedily as can be accomplished without delaying the index of persons.'

The Society adopt to the fullest extent the recommendations of the Commissioners, with respect to the alteration of the legal effect of the diligences of inhibition and adjudication. As these recommendations have been already explained in our pages, it is unnecessary to revert to the subject. We regret that the Society's Committee have not been able to come to a resolution in favour of the introduction of the 'search-sheet' system. The advantages of this system of registration are obvious and incontestable; the plan devised by the Commissioners has evidently been most carefully considered, and appears to be well adapted to the peculiarities of our system of conveyancing. The only objection to it is, that it is doubtful whether it could be satisfactorily worked. But this objection ought not to be allowed to stand in the way of giving it a fair trial in any burgh or country district in which the practitioners may be willing to have it introduced. The system has been in operation for a lengthened period in the Australian colonies, and in other countries where there exists a compulsory system of registration of titles; and wherever it has been tried, it has proved completely successful. The following are the observations of the Committee upon this point:—

'Your Committee have very carefully considered the proposal of the Commissioners to introduce what they call a "search-sheet." The plan is very fully explained, has evidently been very carefully considered, and is strongly pressed by the Commissioners. Your Committee were extremely desirous, if possible, to approve of the suggestion; but they have felt themselves constrained to come to the conclusion, that the plan, though in theory good, is attended with difficulties which render its introduction, for the present at least, impracticable. They are unable to see how the system proposed could be worked without involving nullity, if not of the deed, at least of the registration, as the penalty of any error in the statement of the search-mark in the description of the property. This is a result not to be contemplated without the greatest alarm, and the Commissioners have not shown any practical solution of the difficulty. Your Committee are willing, however, in the meantime, to suspend their judgment without further discussion of the matter in this Report; the Commissioners themselves having come to the conclusion, as stated in the supplement to their Report, "that it may be expedient to defer the actual introduction of the search-sheet, until the transfer of all the district registers to Edinburgh has been completed."

In conclusion, the Committee proceed to consider a variety of miscellaneous suggestions which have been introduced into the Commissioners' Report. Upon two of these we propose to offer a few observations; the first being the proposed conversion of the Register of Sasines into a Register for Preservation. The Committee say—

"5. The fifth suggestion is one of very great practical importance. It is, "That the Register of Sasines should not be limited to a register for publication, but should be made also a register for preservation and execution, with a view to issuing probative extracts of the deeds registered therein, containing a warrant for diligence, and thus saving the expense of recording the same deeds in a separate register." Your Committee cannot recommend the adoption of this suggestion, contemplating as it does not a mere enlargement of the use of the Sasine Record, but a radical and organic change of its statutory nature, and an interference—wholly uncalled for, as it appears to your Committee—with the existing registers for preservation and execution. Your Committee do not mean to say that there is anything to prevent the amalgamation of the whole registers for publication, preservation, and execution; the accomplishment of this, however, would require changes so extensive, as to be justifiable only on the ground of absolute necessity or great advantage. But, so far as your Committee can judge, the whole benefit contemplated by the suggestion under consideration is the saving of double registration or booking of the writs. This very proper object may, it appears to your Committee, be easily attained without any organic or radical change on the system of registration. The Commissioners themselves have clearly and satisfactorily pointed out that the object in view may be accomplished by the keeper of the Register of Deeds being authorized to receive, for permanent custody, deeds previously recorded in the Register of Sasines, and to issue probative extracts and warrants without engrossing the deeds in his register,—minutes of the deeds and warrants being entered in his register, with a reference to the Register of Sasines for the full engrossment.

The Commissioners have adverted to one disadvantage arising from the retention of deeds in the Register House for preservation,—viz., that if carried far, this system would make a progress of titles a mere progress of extracts, and necessitate the examination of the principal deeds at the Register House, at every transfer of the property to which they relate. To obviate this difficulty, it is suggested by the Commissioners that the registrar retaining the deed and issuing an extract, should endorse a certificate upon the extract, setting forth certain particulars, and that such certificate should be declared conclusive as to the facts set forth in it. The particulars enumerated by the Commissioners are—"1. That the original deed is impressed with a stamp of a certain value. 2. That it is free from any erasures, or if any words appear to be written on erasures, what the words are, so that the parties interested might themselves judge whether the erasures were or were not material; and, 3. That the deed appears to have been signed by the grantor and witnesses, and is or is not *ex facie* executed with the solemnities required by law." Your Committee are of opinion, that to require from the keeper of the register such a certificate as that here described, and to make it conclusive, is to lay upon the keeper a duty not properly belonging to his office, and to confer upon him *quasi* judicial functions. In their opinion the keeper ought not to be required to certify anything but plain and patent facts. Questions as to the extent of erasures are sometimes attended with considerable difficulty, and your Committee do not think that any certificate from the registrar on such matters would be satisfactory. The other particulars enumerated are not attended with so much difficulty; but your Committee are of opinion that the only certificate of any value which could be obtained from the registrar, would be one to the effect that the deed was written on so many pages of paper, impressed with a leading duty of so much, and progressive duty of so much. Such a certificate would in some cases (such as settlements of duties at the Inland Revenue Office, when extracts are produced) supersede the necessity of examination of the original deed in the Register House. Extracts, as at present prepared, are open to this objection, that while they show with sufficient distinctness how deeds are signed at their close, they do not show how (when consisting of more than a single page) any page except the last has been signed. This defect, it is thought, may be remedied

by the simple expedient of introducing parenthetically the signatures and numbering of the pages as these occur in the deeds. This system, your Committee understand, already prevails in some countries, and its adoption would go far to enable parties to satisfy themselves, without inspection of the principal deeds, or any special certificate from the registrar, how far they were "*ex facie* executed with the solemnities required by law."

In these observations we entirely concur. It is not desirable to compel parties to part with the custody of their title-deeds as a condition of registration. On the other hand, it is undesirable to encumber the archives of the Register House with the accumulated title-deeds of all the properties in the kingdom. The objection of double transcription under the existing system is a valid objection; but it can be obviated, as proposed by the Society, by recording the title of the deed, with a minute of reference to the record in the Register of Sasines. With reference to the suggestion that the extract should indicate where the pages of the original deeds begin and end, introducing the pagination and signatures as they occur, we wish to add, that the necessity for consulting original deeds lodged in the Record Office for preservation, might be obviated to some extent, by a relaxation of the statutory rules regulating the authentication of deeds. We think that while deeds should continue to be probative when containing a testing clause in the present form, the omission of any of the statutory requirements should not nullify the deed, but should merely impose on the party founding on it the onus of proving the subscription.

With regard to erasures, the best security against fraud in this way is to have the deed printed, and a copy on ordinary printing paper signed as the principal. We defy any one to alter a printed work by erasure so as to escape detection; and where the value of the subject of conveyance is sufficient to justify the expense of printing, as in the case of entails, it should always be done. Printed copies from the same types would be useful for reference, and the production of a copy would be complete evidence of forgery in case of any after attempt to tamper with the original.

The other point among the miscellaneous suggestions which we wish to notice, is that of the shortening of the period of prescriptive possession, upon which the Committee have the following very sensible observations:—

'The Commissioners have incidentally glanced at a subject which has of late years occupied the attention of the legal profession and the public generally,— "the shortening of the period of the long prescription as affecting titles to land." To this they advert as an important "alteration in the law, which has been frequently advocated on grounds of expediency unconnected with our

present inquiry, and which would have a most beneficial effect on the system of searches. They say, "It is too obvious to require illustration, that the delay, risk, and expense of searches would be diminished almost in the exact proportion in which the period was shortened. But the subject belongs to a much wider and more difficult inquiry than that which has been committed to us, and we therefore content ourselves with noticing it only in so far as it has an indirect bearing on registration."

'The subject thus glanced at is undoubtedly a very large and important one, but it has already received much consideration; and your Committee are of opinion that it may very properly be dealt with *now*, either in the Act of Parliament contemplated by the Commissioners, or, perhaps more suitably, in a short separate statute. Your Committee are also of opinion that the period of prescription should be considerably shortened, and they would suggest that it be reduced to twenty years. It is not desirable to increase the number of prescriptions, and we have already a vicennial prescription applicable to Retours of Services. Care, of course, would be necessary to prevent injury to persons relying upon the existing state of the law; but it is thought that a provision that the prescription of twenty years should apply only to a possession of that period, following upon charter and sasine (these words being construed according to the reading given to them as they occur in the Act 1617, c. 12), and that the operation of the new prescription should not begin till after the lapse of twelve months subsequent to the passing of the contemplated Act, would sufficiently protect all existing interests. Your Committee think it quite unnecessary to detail the grounds on which they propose this change in the period of prescription. These are familiar to all interested in the subject, and the change has been recently advocated by lawyers of great experience and well-known caution.'

We would suggest that the alteration should be made by an Act of a single clause, reciting the Scottish statutes establishing the positive and negative prescriptions, and enacting, with the view of shortening the period of prescriptive possession, that in all actions to be instituted after a certain date, say the 31st of December 1865 (or the year following the passing of the Act), the statutes shall be construed as if the word 'forty' occurring in them had been '*twenty-five*;' this construction only to be given where the period of possession in question terminated *on or after* the said 31st of December 1865.

MR CAMPBELL SMITH AND THE LAW OF MARRIAGE.

The Marriage Laws of England, Scotland, and Ireland; being a paper read at a Meeting of the Social Science Association at Edinburgh, October 13, 1863. By JOHN CAMPBELL SMITH, M.A., Advocate. With a Postscript. Edinburgh: W. P. Nimmo.

It is a custom of some antiquity amongst novelists to introduce their budget of tales by some incident of horror or of sentiment,

during the progress of which their romances are supposed to be written or recited. The simplicity of the device may sometimes provoke a smile; but it is not without a certain interest for the reader. He may not, indeed, feel very deeply interested in the fate of the individuals who for so many days or nights are supposed to extemporize romances for his amusement; but he has at least the satisfaction of knowing that, when the thousand-and-one nights are over, or when the plague at Florence has ceased, the book will come to an end; and he may therefore enter upon its perusal with something like a definite idea of the extent of the demand which the author intends to make upon his indulgence.

It is impossible to read Mr Campbell Smith's amusing papers upon the Law of Marriage without being impressed with the conviction, that the subject has been selected by the author mainly with the view of being made a vehicle for the diffusion of his reflections '*de omnibus rebus*.' Yet, as with the class of works to which we have referred, the very attempt to give cohesion to such a concourse of floating ideas brings with it some consolation for the reader. We know all that Mr Smith is going to tell us about Lord Hardwicke's dissenting antecedents and matrimonial speculations. We know that Bentham's opinions upon marriage and civil government were of a more positive complexion than his notions about the trinity; and we know the changes that Mr Smith can ring upon 'greatest happiness,' 'no God worth mentioning,' and 'red-night-cap republicanism.' We have heard all about the three cabinet councillors, all strict supporters of the English marriage law, and all married at Gretna Green. And when the proper smart things have been said about these and similar topics; when 'principles' have been distinguished from 'qualities;' when the requisite absurdities, culled from obsolete English statutes, have been artistically displayed; and when the requisite sensation stories have been selected from the Court of Session Reports, and seasoned with just as much sentiment as Rousseau would have thought it prudent to throw over such chronicles of love and frailty,—when all these points have been duly noted by the reader, he knows that he is coming to the end of what Mr Campbell Smith has to say upon the Law of Marriage. He may therefore proceed with confidence, sure of half-an-hour's entertaining reading, and fearless as to any possible disturbance of his convictions upon the important subject which the author professes to illustrate.

Mr Smith's paper has evidently not been written for the purpose of converting the supporters of the English Law of Marriage to his system. Throughout his argument they are dealt with rather as enemies to be repelled, than as opponents to be reasoned with. Mr Smith is haunted by the idea that certain reprobate English lawyers are going to deprive us of the right of civil marriage, which the author evidently regards as nothing less than the palladium of our national liberties. Under the influence of this panic, he rushes frantically at his imaginary assailants, and gives them as much bad language as would have sufficed half a dozen Homeric heroes for a whole campaign. He will not see the least merit or convenience in the English Law of Marriage, and he is consistently blind to every defect that might be supposed to sully the purity of the code of his country. We cannot help regretting that Mr Smith should have dealt with a subject so eminently deserving of dispassionate consideration in the mere spirit of an advocate; and we regret it the more, because at the present time no one is threatening our peculiar institution, and the present is therefore a favourable opportunity for approaching the subject in the spirit of impartial inquiry.

We think we state the ultimate object of Mr Smith's pamphlet with perfect fairness, when we describe it as an argument in support of the institution of 'Civil Marriage.' This is his strong position; intrenched in it, he is prepared to face the ghost of Lord Hardwicke, to defy Exeter Hall and the Dissenting interest, and to endure with stoical resignation the forfeiture of 'greatest-happiness.' We need not add that, upon this ground of his own selection, he is likely to have the battle all his own way. Certain it is, at least, that he will find no considerable party in England to oppose the legal recognition of marriage as a civil contract. It is easy for Mr Smith (who, we have no doubt, hears three sermons a day, and never by any chance enters a railway train of a Sunday) to denounce as narrow-minded and atheistical those whose opinions on philosophy are different from his own; but, *cui bono*, if they are agreed upon the subject of his argument. Neither the Dissenters, nor the 'atheistical or no-god-worth-mentioning' disciples of the utilitarian philosophy, have any difference with Mr Smith about civil marriages. They are perfectly ready to join him in resisting any attempt to give a monopoly of marriages to the Church; and therefore his abuse of them for their opinions on that score is merely so much marketable invective thrown away, which might have been husbanded for use at his next forensic

appearance against a defender of doubtful orthodoxy. The writer of the article in the *Times*, of which Mr Smith complains in a post-script to his paper, really hit the nail when he asserted that the writer of the paper had forgotten that civil marriages were as fully recognised, and might be celebrated with as little difficulty or delay, in England as in Scotland. It is in vain for Mr Smith to reply that he *was* aware of the law enabling parties to be married by registration, without religious ceremony. If he knew it, so much the worse for his argument, which proceeds throughout on the assumption that the recognition of marriage as a civil contract is the peculiar merit of the Marriage Law of Scotland.

Assuming, then, as a condition of any useful discussion of the subject, that the laws of both sections of the kingdom recognise civil marriage, while both recognise the propriety of a religious ceremony, and give facilities for the co-operation of the civil and ecclesiastical authorities, it would seem that the really important question for consideration is, which of the two systems of law furnishes the best means for attaining the desired result? By the law of England, as at present established, marriage is constituted by registration. The formalities which are prescribed by statute have reference mainly to that object, and it does not appear that they are unreasonable in themselves, or that they include any elements not essential to a perfect system of registration. If there are any needless impediments, we believe that the Legislature would not object to remove them, if its attention were called to them. We do not include among such impediments the prohibition to minors to contract marriage without the consent of their guardians; which we believe to be a reasonable restraint, based on considerations of sound policy. Mr Smith, with perfect candour, admits that an English marriage is not vitiated by non-essential deviations from the prescribed forms, nor even by derivations of greater importance when induced by the fraud of one of the parties. *Prima facie* this is a satisfactory condition of the law; a condition under which, in the words of Bentham, 'one knows what he is bound to: a man is either married, or he is not.' The observation may not have been quite accurate as applied to the English law of marriage at the time it was written; but is it not applicable to the law of England now? The litigation upon Lord Hardwicke's Act is wholly beside the question; because no reasons have been alleged for supposing that similar questions are likely to arise upon the statutes which regulate marriages at the present time.

On the other hand, the law of Scotland prescribes no formalities ; and while in this way a certain theoretical simplicity is secured, it is at the expense of much uncertainty in practice. If the policy of legislation were to draw as many persons as possible into the marriage bond, willing or unwilling, it may be that the marriage laws of Scotland would be found well adapted to secure that result. Certain it is, that under these laws as now administered, individuals do occasionally find themselves married who had no serious intention of entering into that relation ; while others, who had trusted to the lax doctrine of our national institutions, are unable to establish the marriage which they believed themselves to have contracted, in consequence of their inability to furnish the requisite evidence of consent.

We cannot accept implicitly the test proposed by Mr Smith, of a comparison of the number of reported cases, as decisive of the matter. In such cases litigation is often worse than enduring the evil, and people will sacrifice fortune, domestic comfort, and peace of mind, rather than resort to it. For every doubtful case which finds its way into the Courts, we may be sure there are many which are unknown beyond the circle of the connections of the parties. Nor are we prepared to assume with Mr Smith, that the evils to which we allude are the natural and just consequences of 'sexual immorality.' If there is any meaning in this sort of language, it means that irregular marriage is to be maintained as a punishment for vice ; a proposition which, when stated in plain terms, neither requires nor admits of refutation.

It affords us much satisfaction, however, as Scotch journalists, to be able to remark upon one point of difference as to which the panegyrists of our national system may advance their claims without fear of contradiction. We refer to the doctrine of legitimation *per subsequens matrimonium*. From the time when the barons opposed their *Nolumus leges Angliæ mutari* to the dictates of the canonists, this subject does not appear to have engaged the attention of the English Legislature. Yet we are not aware that any legist of authority has ventured to defend the law which excludes a child born before marriage from the status and rights of legitimacy. Every English solicitor is aware of cases in which the right as regards succession has been conceded *ex gratia* by the legitimate children ; and it is not very creditable to the English jurisprudence, that a right of which natural justice compels the recognition should be denied by

the law of the land. Where there has been no subsequent marriage, it is a necessary, though perhaps a hard law, that the fortune of the child must follow that of the mother. But the law of England does not deny to the mother of an illegitimate child the capacity of acquiring social status by a subsequent marriage. The penalty of deprivation of status and of the ties of relationship attaches only to the child; and this penalty, utterly inoperative as it is for any moral or social purpose, is maintained through sheer obstinacy or indolence, in defiance of equity and expediency. We do not expect to see this defect in the marriage laws of England removed in our time; and, until it is removed, we are not prepared to say that the law of Scotland has much to gain by assimilation with that of the sister country.

We must now take leave of Mr Smith's paper, adding the expression of our opinion, that while we have been compelled to differ from the author on his main propositions, we regard his work as a valuable contribution to the controversial literature of the subject. While we think he has approached the subject rather in the spirit of an advocate than in that of an impartial critic, there can be no doubt that he has maintained, with ability and zeal, opinions which are in harmony with the convictions of a large and influential section of his countrymen.

VACATION ARRANGEMENTS.

BILL CHAMBER ROTATION OF JUDGES.

21st March to 2d April,	. . .	Lord CURRIEHILL.
4th April to 16th April,	. . .	Lord BENHOLME.
18th April to 30th April,	. . .	Lord MACKENZIE.
2d May to Meeting of Court,	. . .	Lord KINLOCH.

BOX DAYS.

Wednesday, 20th April; and Thursday, 5th May.

CIRCUITS.

SOUTH.—*Ayr*—Friday, 8th April. *Dumfries*—Tuesday, 12th April. *Jedburgh*—Tuesday, 19th April.—Lords Justice-Clerk and Ardmillan.

WEST.—*Inverary*—Friday, 15th April. *Stirling*—Tuesday, 19th April. *Glasgow*—Thursday, 21st April.—Lords Deas and Neaves.

NORTH.—*Aberdeen*—Thursday, 21st April. *Inverness*—Tuesday, 26th April. *Perth*—Tuesday, 3d May.—Lords Cowan and Jerviswoode.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

M. P., ROBERTSON'S TRUSTEES v. RENNIE AND OTHERS.—Feb. 23.

Trust—Vesting.

The late John Robertson, granary-keeper at Bainsford, near Falkirk, conveyed to trustees, by a trust-disposition and settlement, dated in 1823, his whole estate, heritable and moveable. He died in 1825, when his trustees entered upon the management of his estate, and to a considerable extent realized and distributed it. The trust-estate, so far as undistributed, forms the fund *in medio* in the present process. Under the deed the truster's widow had a liferent of the whole estate. John, James, William, and Robert Rennie, who were nephews of the trustee, all survived him, but all predeceased his widow, who died in 1859. Three of the brothers had assigned their interests under the trust-deed to the late James Russell, writer in Falkirk, who, on his death, was succeeded in his estate, heritable and moveable, by his eldest son, James Russell of Blackbraes, who is also dead. The trustees of Mr Russell of Blackbraes, founding on the assignations to their constituent's father, now claim the share of the fund *in medio* which belonged to the Rennies, and was assigned by them.

The Lord Ordinary (Barcable) found that the provisions in favour of the Rennies in the clause of the trust-deeds above quoted did not vest till after the death of the truster's widow; and that as they predeceased her, the said shares never vested in them, and they were therefore not *in titulo* to grant the assignations founded on by Russell's trustees, whose claim his Lordship accordingly repelled.

Russell's trustees having reclaimed, the Court to-day, without calling on the respondents' counsel, adhered to the Lord Ordinary's interlocutor.

WESTERN BANK LIQUIDATORS v. BROWNE'S TRUSTEES.—Feb. 26.

Liability of Trustees for Calls.

The defenders in this action are William Buchanan of Shandon, and other five gentlemen residing in or near Glasgow, and designed in the register of the shareholders of the Western Bank, as the 'Trustees for Mrs Ellen Browne, Glasgow,' and the pursuers seek to make the defenders liable personally, as partners of the Western Bank, in payment of calls, made in the course of the winding-up of the company under the Winding-up Acts, in respect of sixty shares of the capital stock held by the defenders as Browne's trustees. The liability of the defenders personally is disputed on the ground that they became, as they contend, partners of the company only as trustees for others, and to the effect only of employing trust-funds in the purchase of shares in the company as a trust-investment, and rendering the trust estate only, or themselves *intra valorem* of the

trust-estate, answerable in the liabilities of partners. The defenders are trustees appointed by the marriage-contract of Mr Charles Wilson Browne and Miss Ellen Buchanan, dated the 14th October 1845. Within a month of their acceptance of office the defenders invested a sum of between L.4000 and L.5000, being, as they say, the whole trust-estate, in acquiring sixty shares of the capital stock of this banking company. These sixty shares were a portion of certain new shares then issued for the first time, on the terms and conditions specified in a deed of accession which was subscribed by the defenders as allottees of the shares. The bank stopped payment in November 1857, but has since paid all its creditors by means of contributions from the individual partners; and the present action is, therefore, insisted in only for the purpose of equalizing the losses among the shareholders, and of making the defenders, who have hitherto contributed nothing beyond the amount of their paid-up capital, relieve their copartners rateably of their superadvances. The deed of accession is subscribed by the defenders by their ordinary names and designations, without any additions or qualification; but in the testing-clause there is added to the ordinary names and designations of the defenders the following words:—‘Trustees for Mrs Ellen Browne, spouse of the said Charles Wilson Browne, the majority surviving being a quorum.’ The defenders were entered in the register of shareholders as trustees for Mrs Ellen Browne; and in the returns of the stamp-office they were described in the same way. Notices were sent to them by the manager of the company in their character of trustees. The dividends were paid to Mr Charles Wilson Browne, as factor for the trust-estate, in virtue of a mandate granted to him by the other defenders as trustees, dated 3d February 1849. In this state of facts, the Lord Ordinary (Kinloch) found ‘That by the terms of the contract by which the defenders became partners of the Western Bank, they did not undertake any personal liability, but that of trustees only; and that they are not liable in the calls now sued for personally, but only to such extent as they may possess funds belonging to the trust-estate.’

After an oral discussion on the reclaiming note, the Court ordered written argument, and sent the question of the trustees’ *personal* liability to the whole Court. Lord Ormisdale gave no opinion. The Lord Justice-Clerk, Lord Cowan, Lord Neaves, and Lord Mackenzie were of opinion that the defenders were personally answerable, with the exception of Dr Buchanan, who was not present when the trustees resolved on purchasing the shares, and who did not sign the deed; Lord Benholme, Lord Jarvis-woode, and Lord Barcaple thought the interlocutor should be adhered to, and Lord Kinloch adhered to the opinion expressed in it, so that there were four of the consulted judges on each side. All the four judges of the First Division were of opinion that the interlocutor of the Lord Ordinary should be adhered to, and it was adhered to accordingly.

GILLON AND CO. v. DUNLOP’S EXECUTORS.—Feb. 27.

Jurisdiction—Executor.

This is an action at the instance of Messrs John Gillon and Co., preserved provision manufacturers in Leith, for recovery of an alleged debt due to them by the late Andrew Dunlop, merchant, Bombay. Andrew Dunlop is dead, and the present action is directed against his accepting

and acting trustees and executors—viz., Robt. Dunlop, writer in Glasgow, and Arnold Burrows Collett, coach-builder in Bombay, and residing there. No appearance was made in the action for Collett, but the other defender, Dunlop, defended on a variety of grounds, and among others, on these grounds:—1st, That Collett being a foreigner, and having no domicile of citation in Scotland, the Court had no jurisdiction to entertain the action against him; and 2d, that the action was therefore incompetent against him, Dunlop, as one of two executors, while the other had not been validly made a party to it. The Lord Ordinary (Ormidale) found that the defender Collett was not subject to the jurisdiction of the Scotch Courts, but that the action as against Dunlop was not thereby made incompetent. Dunlop having reclaimed, the Court allowed a proof before answer.

To-day the Court unanimously held that, as the executry estate was a foreign one, and one of the two executors was not subject to the jurisdiction of the Scotch Courts, and both might be sued in England, the present action ought not to proceed, and it was accordingly dismissed.

FERGUSON, RENNIE, AND CO. v. THE SCOTTISH CENTRAL RAILWAY COMPANY.—Feb. 27.

Carriage—Sale—Lien.

On 10th June 1860, John Duncan and Co., of Dundee, sent certain goods to the Dundee, Perth, and Aberdeen Railway Company at Dundee, to be transmitted to Glasgow by that Company's line to Perth, and thence per Scottish Central Railway. The Dundee and Perth Company gave a receipt for the goods, acknowledging to have received them to be conveyed to Glasgow, 'subject to the conditions on the back' thereof. One of these conditions was in the following terms:—'All goods, from whomsoever received, or to whomsoever belonging, are subject to a lien, not only for the freight of the particular goods, but also for any general balance that may be due from the owners, consignees, and if, in fourteen days after the company first receive the goods, the money due be not paid, they will be sold by auction, and the proceeds applied towards satisfaction of such lien and expenses.' Duncan and Co., the consigners, sent to the pursuers, who were the purchasers and consignees of the goods, the railway company's receipt endorsed as follows:—'Deliver the within to Messrs Ferguson, Rennie, and Co. (Signed) John Duncan and Co.' The goods were duly forwarded to Glasgow, and on 22d June the pursuers, who had made advances on them to Duncan and Co., presented the endorsed receipt to the Scottish Central Railway Company at Glasgow, and demanded delivery of the goods, which was refused; thereupon (29th June) the pursuers presented a petition to the Sheriff to have the Scottish Central Railway Company ordained to deliver the goods to them, or to pay their value. The Scottish Central Railway Company opposed the petition, on the ground that they had not the goods, which had been re-transmitted to the Dundee and Perth Company on 24th June, according to orders received from them, to be held by that company, by virtue of their lien in security of a general balance due to them by John Duncan and Co. The Scottish Central Railway Company further pleaded, that in carrying the goods to Glasgow from Perth, they

were merely the agents of the Dundee and Perth Railway Company, and therefore bound to comply with their instructions.

The Sheriff-substitute found in favour of the Railway Company, and dismissed the petition.

The Sheriff (Sir A. Alison) recalled his Substitute's interlocutor, and found in favour of Ferguson, Rennie, and Co.

The Scottish Central Railway Company thereupon brought the present advocacy, and to-day the Court substantially affirmed the interlocutor of the Sheriff (Sir A. Alison).

DOBIE v. THE MARQUIS OF LOTHIAN AND JOHN BOWES.—*March 2.*

Lease—Assignment—Bankruptcy.

In 1860 the estates of the pursuer were sequestrated, he being then tenant of the farm of D'Arcy, in the parish of Newbattle, under a lease from the Marquis of Lothian. By the lease assignees and sub-tenants were specially excluded, except with the consent of the proprietor. In 1861, Lord Lothian's factor addressed a letter to the defender Bowes, who was appointed trustee on the pursuer's sequestrated estate, offering to pay to him as trustee a certain sum for a renunciation of the lease of the farm, and for the whole stock, crop, etc., thereon. It was stated in the offer that L.10 of the sum was for the renunciation of the lease, and the remainder for the crop, stock, etc. The concurrence having been obtained of the Accountant in Bankruptcy to the sale by the trustee by private bargain of the lease, which is necessary under the Bankruptcy Act, the trustee therefore accepted Lord Lothian's offer, and renounced the lease. The present action is brought to have the whole proceedings of the defender Bowes (the trustee) set aside, *inter alia*, on the grounds—(1) That as the lease contained an exclusion of assignees and sub-tenants, it did not pass to the trustee by the sequestration, and therefore could not be renounced by him; (2) That the offer and acceptance could not be held equivalent to consent, not having taken place till after the sequestration; and (3) That the sum of L.10 paid to the trustee for the renunciation being out of all proportion to the real value of the lease for the remainder of its term, the interests of the bankrupt were unfairly sacrificed by the transaction. Written cases having been given in and laid before the whole Court, the case was to-day advised. All the consulted judges were of opinion that the action ought to be dismissed.

LANG v. THE PRESBYTERY OF IRVINE.—*March 5.*

Reduction of Decree of Church Court.

This action was at the instance of the Rev. Dr Lang of Sydney, New South Wales, against the Presbytery of Irvine, concluding first, for the reduction of the sentence pronounced against him by that Presbytery, on the 9th September 1851; second, to have it declared that notwithstanding that sentence he is still a minister of the Church of Scotland; and third, for damages against those who pronounced the judgment. It was averred that the sentence was pronounced without citation, notice, libel, or evidence; and by it Dr Lang was declared to be no longer a minister of the Church of Scotland, incapable of receiving presentation to any parochial charge, and that he was no longer qualified to officiate as a minister of the Scotch Church at Sydney. The case came up on a reclaiming note at the

instance of Dr Lang against the interlocutor of Lord Jerviswoode in the Outer House, dismissing the case.

The Lord President, in pronouncing judgment, entered at some length into the facts set forth in the condescendence, holding that the pursuer had not exhausted the remedies competent for him in the ecclesiastical courts for the reduction of the sentence of the Presbytery. He thought the Presbytery had a right to take up the case under a remit which was made to them from the General Assembly, along with the various documents connected therewith; but Dr Lang said, notwithstanding, that it was their duty to have libelled him. Now he (the Lord President) could not agree with that. This was a question whether Dr Lang had ceased to be a member of the Church, and it could not be necessary in that case that there should be a libel in order to determine whether a party had ceased to be a member. Take the case of Dr Lang himself. Had he gone to the Presbytery of Irvine, and said, 'I have nothing whatever to do with you, and have been for the last six months an ordained priest of the Church of Rome, which is a much purer and truer Church than this,' was the Presbytery or the General Assembly not entitled to hold that he was no longer a member of the Church of Scotland? He thought they should have given notice to Dr Lang, if he was not there, to state the conditions of his departure from the Church. The Presbytery had acted inconsiderately in not doing so, but he did not understand that the conduct of the Presbytery was attempted to be vindicated in this case; on the contrary, they themselves showed that they had acted rashly and inconsiderately, but it did not follow that they proceeded incompetently in so far as regarded the matter he had alluded to. He (the Lord President) could not hold otherwise than that the Presbytery acted here as an authorized Church court in an ecclesiastical matter. They might have acted from an error in judgment, but without an allegation of malice it would not be competent to entertain an action of damages against them. As to the conclusion for reduction of the sentence, that came to be a matter at this stage of comparatively little importance, because the sentence was recalled. He therefore thought that the view the Lord Ordinary had taken was a correct view, and he saw no ground for altering the judgment. The other judges concurred.

A. v. B.—March 9.

Reparation—Breach of Promise.

This is an action of damages for breach of promise of marriage. The defender admits that in the month of November 1862 he began to pay his addresses to the pursuer, and that in January 1863 he made an offer of marriage to her, which was accepted. The parties thereafter met and corresponded as affianced persons, the defender addressing the pursuer in his letters as 'My dearest A.,' and subscribing himself, 'Yours with all love.' This continued till 13th May 1863, when the defender wrote to the pursuer the following letter :—

'Wednesday, 13th May 1863.

'MY DEAR,—I am afraid you have at present but little idea of what I am about to tell you, and I can assure you that the communication causes me very much pain.

'You will recollect the conversation we had lately, in which we imagined two persons engaged to each other, one of whom had entered on the engagement whilst having the warmest regard and esteem for the other, and believing, at the same time, that love was therewith combined, and trusting confidently to time ripening this feeling into a warm and lasting love. We supposed that the engagement had lasted for some time, and that then it was found that such a change had not taken place, and that it had become apparent that real love was not there at all.

'You thought that, under these circumstances, it would be the duty of that one plainly to tell the truth, and let the other choose. In this I agreed, and do agree with you perfectly; and I have now the most painful duty to perform of telling you that such are exactly my circumstances, and it was the consciousness of this truth which led me into that conversation, wishing to have your views plainly upon the subject, although at that time I had not made up my mind as to what course I would pursue.

'I am afraid, —, by this confession I will cause you a great deal of pain, and for that reason I have tried to avoid serious thought upon the subject for a good few weeks past, intending just to let things take their course, and run the risk; but now I am unable longer to do so, as I am convinced that it is far more honest to tell you the truth plainly and be guided by your decision, rather than to keep up what is indeed little short of hypocrisy.

'What causes me most pain in making this statement is the conviction which I feel that I have really won your pure and ardent affection, and that I cannot return it; this is indeed painful.

'I feel that I have done you a very great wrong, one that I can never sufficiently expiate, but I hope you will believe me when I say that nothing was further from my intentions; and great as that wrong certainly is, I am satisfied that I would have been doing you an immeasurably greater wrong had I left matters to take their course under existing circumstances.

'And now, —, I don't think I have anything more to add, further than to say that it lies with you to decide; and if with this knowledge you would still prefer that our engagement should not be broken off, I promise that I would enter upon the new state with the firm intention of doing my best in the absence of love to make your life comfortable and happy.

'I am sure the perusal of this letter will cause you great pain, but I can assure you it causes me *only less* pain to write it; and had the subject not been such an awfully important one, I never would have taken this step.—Yours sincerely,
(Signed) 'B.'

The lady now brings the present action of damages against the gentleman, founding upon the above letter as a virtual breach of his engagement. She avers on record that by the marriage formula of the Established Church the man solemnly 'vows to be a loving and faithful husband,' and the woman a 'loving, faithful, and obedient wife;' that this was the kind of marriage which was in the contemplation of both parties when they entered into their engagement, and not a marriage without love; and that, although in the said letter the defender pretended to give the pursuer the option of either marrying him 'in the absence of love,' or of breaking off the engagement, this was a mere cunning and fraudulent

device on his part to escape the pecuniary responsibility which he knew he had incurred. The defender, in his defences, states that he is still willing to marry the pursuer, and offers to do so, and to do everything in his power to secure her happiness.

The pursuer proposed an issue in the following terms:—

‘Whether, in or about the month of November 1862, the defender promised and engaged to marry the pursuer? And

‘Whether the defender wrongfully failed to implement his said promise and engagement, to the loss, injury, and damage of the pursuer?

‘Damages laid at L.500.’

The defender objected to any issue being allowed, on the ground that while the pursuer founded on the above letter of the 13th May 1863, as containing the alleged breach of promise, it was plain from the terms of that letter that no such breach had been committed, for in it the defender left it to the pursuer herself to say whether the marriage should take place or not.

The Lord Ordinary (Ormidale) reported the case to the Court, with a note, in which his Lordship stated that it appeared to him that the case, although in some respects very peculiar, ought to be tried, it being for the jury to determine whether or not there had been a breach by the defender of his promise to marry the pursuer.

The Court to-day, after hearing the defender’s counsel, without calling on the pursuer’s counsel, approved of the issue to try the case in the terms proposed by the pursuer.

App., WILLIAM INGLIS IN HIS SEQUESTRATION.—March 17.

Bankruptcy—Composition—Settlement.

The bankrupt made offer of a composition of 1s. 6d. per pound. This being a second offer after a previous one had become ineffectual, required the written consent of nine-tenths in number and value of the creditors ranked or entitled to be ranked on the estate. Accordingly, along with the offer of composition, the bankrupt produced a consent, signed apparently by eight creditors; but, as it afterwards turned out, one of the signatures was a repetition of the name of a creditor who had formerly signed. There was admittedly one creditor who did not sign the consent to the offer. The offer was dated in September, and there had been a meeting of creditors during that month to consider the offer. It was not accepted. The same consent was used for another meeting, called for 12th November, to consider an offer of the same amount. The apparent statutory majority accepted the offer, but Joseph Taylor and John Gardiner, two of the creditors who had voted against the resolution, appealed to the Sheriff against it. The Sheriff-substitute at Greenock sustained the appeal, on the ground principally that the written consent produced did not refer to the composition offered at the meeting on the 12th November, but to the offer made at the meeting on 16th September, which had become ineffectual; and that therefore there was no assent to the offer made at the November meeting.

The bankrupt appealed this judgment, on the following grounds:—1, That the note of appeal in the Sheriff Court was not lodged and marked within fourteen days, as required by the statute; 2, That the sequestration process was not before the Sheriff when he gave judgment; 3, That

Gardiner, being assignee of Skinner, a creditor who had assented to the composition in writing, was bound by said assent; and 4, That minutes were not allowed in the Sheriff Court, although asked by the bankrupt. Only the first and third grounds of appeal were pleaded. On the appeal in the Sheriff Court an interlocutor had been pronounced on the thirteenth day after the date of the resolution appealed against, and this interlocutor had been initialed by the Sheriff-clerk. There was also a marking on the back of the appeal of payment of the dues to the person acting for the Sheriff-clerk. The Court unanimously held that these markings sufficiently complied with the requirements of the statute, and that a creditor signing a consent to an offer of composition being made was not thereby bound to accept of said offer.

THE LORD ADVOCATE v. FLEMING AND THOMSON. ('The Pampero.')—
March 18.

Foreign Enlistment Act.

The proceedings originated in an information of seizure of a ship or vessel called the 'Pampero.' That information is laid on the Act 59 Geo. III., cap. 69, commonly called the Foreign Enlistment Act. It is directed against John Fleming and certain other persons. It contains ninety-eight counts, in which the defenders are charged, or are intended to be charged, with contraventions of the statute. The first count sets forth that the defenders, 'without any leave or licence of her Majesty, did equip the said ship or vessel with intent and in order that such ship or vessel should be employed in service of certain foreign States styling themselves the Confederate States of America, with intent to cruise and commit hostilities against a certain foreign State with which her Majesty was not then at war—to wit, the Republic of the United States of America.—contrary to the form of the statute in such cases made and provided, whereby and by force of the statute in that case made and provided, the said ship or vessel, together with the said tackle, apparel, and furniture, became and was forfeited.' Other seventy-one counts are substantially the same as the first, only substituting for the word 'equip' the words 'furnish or fit out,' or 'attempt to equip,' etc. The third count sets forth that the defenders 'did equip the said ship or vessel with intent to cruise and commit hostilities against a certain foreign State,' etc. Twenty-three other counts are substantially the same as the third, only varying the expression from 'equip' to 'furnish' and 'fit out.' The ninety-seventh count sets forth that the defenders 'did attempt to fit out the said ship or vessel with intent and in order that such ship or vessel should be employed in the service, etc., as a transport or store-ship against a certain foreign State,' etc. The only other count is the ninety-eighth, which the Lord President described as a compound of the essence of all the preceding counts, irrespective of concord or consistency. Fleming and others, against whom the information was directed, claimed the vessel as owners. Certain other parties—viz., Messrs J. and G. Thomson, of Glasgow, the builders of the vessel—also claimed as for a right of lien or retention over the vessel for a sum of L.16,000 due to them as builders. The pleas put in by the owners are to the effect—1st, That the vessel had not become forfeited for the several supposed causes in the information mentioned, or for any of them, as by the information charged; 2d, That each and all of

the counts in the information are bad in law; 3d, That each and all of the counts are unfounded in fact. The pleas put in by the builders are to the same effect as the pleas for the owners. A motion in the cause having been made before the Lord Ordinary in Exchequer Causes, an argument took place as to the relevancy of the information. The defenders contended that the greater number of the counts were irrelevant, and could not be sent to trial. The substance of the objection was, that the matters alleged on the face of the information, as regards the greater number of the counts, were not contraventions of the statute according to the true reading and construction of it, and that the defenders were not bound to go to trial upon allegations which, even if proved, would not be contraventions of the statute or grounds of forfeiture. The Lord Ordinary did not think it necessary or expedient to decide before trial the questions of law and relevancy so raised by the defenders, and he pronounced an interlocutor by which he appointed Tuesday the 5th April for trying the issues in said information. That judgment was brought under review by reclaiming note; and after a lengthened argument upon the relevancy of the charge, judgment was delivered to-day in the following terms:—‘The Court, having heard counsel on the objections lodged by the defenders against the relevancy of the information, find as follows:—As regards the objection urged against the relevancy of the first count and certain other counts, on the ground that the matters therein set forth do not amount to a contravention of the statute, inasmuch as it is not alleged against the defenders or any of them that they had an intent to cruise or to commit hostilities: Find that the said objection is not well founded, and repel the same. Second, as regards the objection urged against the relevancy of the first count and certain other counts, on the ground that the arming is not alleged in terms, and that the terms “equip,” “furnish,” “fit out,” cannot be held as sufficiently definite: Find that the said objection is not well founded, and repel the same. Third, Find that the third count, and twenty-three counts modelled upon the third, have been withdrawn by the Lord Advocate.’

A petition for appeal, on the part of the defender, was, without the ordinary formality in such cases, held by the Court as lodged, and leave to appeal was refused.

THE LORD ADVOCATE *v.* FLEMING AND OTHERS.—*March 19.*

Diligence—Recovery of Productions.

This case was again called to-day to dispose of the Crown’s motion for a diligence to recover numerous articles and documents to be used at the trial as evidence of the purpose and intent with which the ship was being built. The Crown, *inter alia*, asked a diligence to recover all fittings and furnishings (such as guns, etc.), or intended fittings and furnishings; also all models of the vessel. The defenders having objected to this being granted, in regard to the fittings, etc., the Court sustained the objection. Their Lordships held, that it was not competent to grant letters of diligence for recovering anything except writings and documents, to which extent only the diligence asked was granted. The Court gave no opinion as to whether the Crown was entitled to recover the articles sought; they merely decided they could not be recovered in the manner proposed—*viz.*, by letters of diligence.

SECOND DIVISION.

HARDIE v. THE MAGISTRATES AND TOWN COUNCIL OF PORT-GLASGOW.—
Feb. 23.

Property—Water-right.

The pursuer avers that under the Port-Glasgow Water Acts, the defenders or their predecessors acquired from the former proprietors of Glenhuntly right to use the water of the Glenhuntly Burn, and made the necessary operations with his permission. Her complaint is, that in 1847 they improperly altered and increased their works; and the present action has been brought for the purpose of declaring that the operations in 1847 were illegal, and that the burn should be restored to its condition before 1847. The pursuer's allegation as to her own title is, that her uncle, Mr Henry, the former proprietor of Glenhuntly, conveyed his property to trustees by a trust-settlement, in which he directed them, after fulfilling other purposes, to pay over the annual proceeds to her during her life; and, if it should be her wish, to allow her the personal occupancy of the house and such parts of the grounds of Glenhuntly as were personally possessed by him. The defenders, *inter alia*, pleaded that the pursuer not having a title to the lands of Glenhuntly, is not entitled to sue the present action. The Lord Ordinary (Barcable) sustained the plea and dismissed the action. The pursuer having reclaimed, her counsel was heard in support of the reclaiming note.

The Lord Justice-Clerk said he was satisfied the Lord Ordinary's interlocutor was right. All that the pursuer had set out was a personal right to a liferent of these lands, and that was no sufficient title for suing such a declarator as the present; but, farther, the pursuer's right depended on the agreement of 1848, and was measured by the state of matters at that date; but the wrongous operations, if such there had been, had taken place in 1847, and, therefore, on that ground also she had no interest in the present question. Lords Cowan, Benholme, and Neaves concurred.

The Court, therefore, adhered with expenses.

Adv., MORRIS v. PHILLIPS AND OTHERS. ROXBURGH v. WRIGHT AND OTHERS.—Feb. 26.

Injury by fault of Fellow-workman.

These were two cases arising out of the death of two colliers by an explosion of fire-damp, which took place on the 26th October 1859, in the Kenmuir Pit, No. 2, leased by the advocator, Roxburgh, and in which the advocator, Morris, was underground manager. The Sheriff-substitute (Smith) assoltized both the advocators, while the Sheriff (Alison) decerned against both. The note of advocacy was debated last week. To-day the case was advised.

The Court held that the explosion took place through the culpable negligence of Morris, the underground manager of the pit, and therefore subjected him in damages; but their Lordships held that there were no grounds for subjecting Roxburgh, the lessee of the pit, in damages, in respect that Morris and the men who were killed were fellow-workmen in the same common employment.

Adv., FORMAN v. BOOKLESS.—Feb. 27.

Process—Reference to Oath.

This is an advocacy from the Sheriff Court of Roxburghshire, in which the question is as to the import of the respondent's deposition on a reference to oath. It appears that the deposition had been taken before the Sheriff-substitute at Jedburgh; but that instead of taking it down at length, he had noted it in the short manner introduced by the section 10 of the Sheriff Court Act of 1853 in regard to the taking of evidence. The Court were of opinion that the deposition had been irregularly taken; that a reference to oath does not fall under the provisions of the section 10 of the statute; and they therefore granted a commission to take the deposition of the respondent in the usual formal manner.

Adv., STEPHEN v. FERGUSON AND LITTLE.—Feb. 27.

Parent and Child—Liability for Furnishings.

This is an advocacy from the Sheriff Court of Forfarshire. The original action was at the instance of Messrs Ferguson and Little, clothiers and outfitters in Glasgow, against Mr Stephen, shipbuilder, Dundee, for payment of two accounts, being furnishings made to his sons, one a young man of twenty-eight, a medical student in Edinburgh, and the other a lad of seventeen, also at college. It appears that Mr Stephen, up to 1857, lived in Glasgow with his family, and that the advocates were the family tailors. During the residence in Glasgow, it was proved that Mr Stephen had paid the accounts of furnishings, made not only to himself, but to his sons. Mr Stephen, in 1857, however left Glasgow, and took up his residence in Dundee. While there, he continued to employ the respondents as tailors. It is alleged that his two sons did so also, and that the father paid the accounts; but the Court held that that fact was not proved. In April 1861, Andrew and Samuel Stephen, the advocator's sons, who were then living in Edinburgh, went to Glasgow, and ordered goods from Ferguson and Little to the amount of L.53, 3s. 9d. and L.36, 17s. respectively. These accounts form the ground of the present action. Mr Stephen refuses to pay for them, and alleges that he gave no authority for their being contracted. It appears that the two sons left their father's house in Christmas 1860, and took up their residence in Edinburgh. The respondents, on the other hand, maintain that the goods in question were furnished, according to previous custom, on the credit and responsibility of Mr Stephen. The Sheriff-substitute (Ramsay Ogilvy) found Mr Stephen liable, and the Sheriff adhered. To-day the Court recalled this judgment, holding, that in consequence of the interruption caused by the defender removing to Dundee, there was no implied mandate to the sons to contract accounts with the respondents on the footing on which they had contracted in Glasgow, particularly in respect they were at the date of the account living separate from their father. The character of the furnishings was declared by the Court to be utterly unreasonable and extravagant, and such as ought to have put the pursuers on their guard.

HUBBACK v. NORTH BRITISH RAILWAY COMPANY.—March 3.*Process—Special Jury.*

This was an action of damages by one of the shareholders of the North British Railway Company, brought against the Company in respect of personal injuries. The case has been put down for trial at the approaching spring sittings; and the Court were now moved by the defenders to allow it to be tried by a special jury. The pursuer stated that it seemed undesirable that an ordinary case of damages should be tried by a special jury, but that it was more a matter for the Court than for the parties.

The Lord Justice-Clerk said, that he believed that in England a special jury was granted when either of the parties desired it, and that he had been in the habit of following that rule.

The Court granted the motion.

THE UNITED COLLEGE OF ST ANDREWS v. BLYTH AND OTHERS.—March 4.*Reduction—Dilatory Defences.*

This was an action of reduction-improbation and declarator of non-entry, with the usual conclusions in such an action. The action is pursued by the United College in the character of superiors of certain subjects belonging to the defenders, and set forth as lying on the north of the North Street of St Andrews, and betwixt that street and the way leading from the harbour to the castle. The summons calls for production of all the titles of the said subjects, 'made, granted, or conceived by the pursuers, or any of their ancestors,' in favour of the defenders. The title on which the pursuers found is a charter of erection in their favour, granted by James IV. in 1512. The defenders lodged what they called preliminary defences, and the Lord Ordinary (Kinloch) ordered a record to be made up and closed upon them. The defenders' pleas in that record were as follow:—'1. The defender Blyth having been divested of all right to the subjects as to which the entry is claimed prior to raising the action, the same falls to be dismissed, so far as he is concerned, with expenses. 2. The pursuers have made no statements in point of fact relevant, or sufficient to support the conclusions of the summons. 3. The pursuers have not produced, and do not possess, any sufficient title to insist in the conclusions of the summons; and the defenders should therefore be assoilzied with expenses. 4. The pursuers have no right or title to insist in the conclusions of the summons, in so far as they relate to the subjects possessed by the defenders, in respect that the titles under which the defenders hold the property referred to in the summons exclude the pretended title of the pursuers.' Thereafter he heard parties on that record, and on 12th January 1861 he pronounced an interlocutor, 'before answer, and under reservation of all pleas, allowing the pursuers a proof of the facts averred by them in support of their title to sue in the present action, and to the defenders a conjunct probation.' This proof was taken; and upon considering it, the Lord Ordinary sustained the objection to the title to pursue, and dismissed the action. Against this judgment the pursuers reclaimed, and counsel was heard at great length. The case was advised to-day.

The Lord Justice-Clerk said he was satisfied that the Lord Ordinary's allowance of proof before answer was a great miscarriage. Under the

Court of Session Act of 1850, sec. 7, it is enacted, 'that where in a process of reduction the defender is to object to the title of the pursuer, or to plead on an exclusive title, or to state any other objection against satisfying the production, he shall in the first instance lodge defences confined to these points.' That was the only case in which it was now competent to propose dilatory defences before lodging peremptory defences; but the only dilatory defences which could be considered at that stage were those specified in the seventh section of the statute. In his (the Lord Justice-Clerk's) opinion, none of the defenders' so-called preliminary pleas were of the nature contemplated by the statute. He (the Lord Justice-Clerk) was clearly of opinion that the pursuers were entitled to call for production of all the defenders' titles flowing from themselves, without any critical examination of their own title. They were here founding on a Crown charter, and no tenable plea against satisfying the production could be made, except where their call was for Crown titles, or the defenders founded on a Crown title.

Lords Cowan, Benholme, and Neaves concurred.

The Court, therefore, recalled the interlocutor, and remitted to the Lord Ordinary to appoint the production to be satisfied, and generally to proceed with the cause.

M'LELLAN v. MILLER (TURNER'S EXECUTOR).—March 11.

Stamp Laws—Bank Cheques.

This was an action for payment of the sum of L.29, 10s. 9d. contained in a draft or order dated 4th December 1858, granted by the late William Turner to the pursuer as the agent of the City of Glasgow Bank in Glasgow. Along with the summons the pursuer produced the draft founded on, as required by the Judicature Act. It appearing that the draft was unstamped, the defender took a plea to that effect, which, after a record had been made up, the Lord Ordinary (Barcaple) sustained, and assoilized the defender against this interlocutor. The defender reclaimed, and after hearing counsel the case was advised to-day.

The Lord Justice-Clerk said—The draft in regard to which the objection had been taken, would, until lately, have been exempt from stamp-duty; but the exemption in favour of such drafts on bankers had been abolished by the 21 Vict., c. 20. The effect of that statute had been to place such drafts in all respects in the same position as bills of exchange and promissory-notes, in regard to which the law, as established by 31 Geo. III., c. 25, sec. 19, declares that they are null if not stamped, and cannot be effectually stamped after being issued; but the pursuer founded upon the combined operations of the 23 & 24 Vict., c. 111, sec. 18, and 24 & 25 Vict., c. 91, sec. 82, as taking off the effect of the 31 Geo. III. The question was, did these recent statutes make it lawful to have the instrument in question stamped now? It was said that under them a private party can at any time put an adhesive stamp on such a draft. That argument, however, could not be listened to in the present case, because the pursuer had chosen to put the draft in suit in an unstamped condition. Again, it was said the revenue officers were now entitled to stamp this draft. Very clearly they were not entitled to do so by *impressing* a stamp thereon; but then it was contended, that under 24 & 25 Vict., c. 91, sec. 82, they were empowered to put upon it

the proper adhesive stamp. No such construction could fairly be put on that section, for the proviso at the conclusion makes it incompetent for the revenue officers to put an adhesive stamp on any instrument upon which, by the prior law, they could not have put an impressed stamp after it had been issued. In this latter class the present draft was undoubtedly included since the 21 Vict. The only other point for consideration was the effect of the 23 & 24 Vict., c. 113, sec. 18. Now, by that statute a banker was allowed to put an adhesive stamp upon any unstamped draft presented to him, and to pay upon such draft; but that statute had no reference to revenue officers, or any other persons except bankers. And it could not be held that the 24 & 25 Vict., c. 91, sec. 32, extended the provisions of the 23 & 24 Vict. to revenue officers and others beside bankers. He (the Lord Justice-Clerk) was therefore of opinion, that the present draft was now unstampable, and that the Lord Ordinary had rightly disposed of the case when he dismissed the action.

NISBET v. CAIRNS AND HOWDEN.—*March 11.*

Sale—Power, Construction of.

The pursuer in these two conjoined actions of reduction is John Nisbet, teacher, Eyemouth, and the defenders are John Fuller Cairns, baker, Coldingham, and Francis Howden, residing at Falkland Palace, the executor of the late Mrs Cockburn. The object of the action is to reduce the title of the former defender to certain subjects in Eyemouth that belonged to the pursuer's grandfather. The subjects were sold after the death of the old man under a bond and disposition in security granted in 1831 to Mrs Cockburn by him. After this sale, the balance of the price was thrown into a multiplepoinding in the Sheriff Court of Berwickshire. Mr William Purves, banker and writer in Dunse, obtained L.145 of the funds in respect of an absolute disposition to his father, bearing to have been granted for the sum of L.200 instantly paid, and he granted to the defender Cairns a disposition on the narrative of the sale under Mrs Cockburn's bond, and giving as the reason for the disposition, 'of which sale I approved, and hereby approve.' In the first action of reduction, the sale under the bond of Mrs Cockburn was assailed on the grounds, still insisted in,—(1) that it was inept, in respect that the bond required advertisement 'in the Berwick and Kelso newspapers for at least one month weekly,' and by handbills, and that there was not advertisement in all these papers weekly; and further, that there was one week blank, there being no advertisement between that in the *Berwick Advertiser*, published on Saturday, 12th April 1845, and that in the *Kelso Chronicle*, published on Friday the 25th April; and (2) that due legal intimation that the bond was to be called up was not made to the pursuer, who was a pupil at the time, such intimation being impossible without letters of supplement, which were not used. As a defence to this action, the disposition from Purves, and the sasine following, was founded on as a title to exclude; and another action was raised to set aside the absolute disposition of the pursuer's grandfather, on the grounds of imbecility and circumvention. These two actions were conjoined. Issues were allowed and lodged, when, by a joint-minute of admissions, the disputed facts were adjusted and proof dispensed with, it being admitted that the disposition to Purves was a disposition in security

for L.160 as at 12th November 1847, and the imputations against his conduct being withdrawn.

The Lord Ordinary (Ormidale) sustained the defenders' pleas, and assolizied them from the conclusions of the action; but upon a reclaiming note, the Court were of opinion that the sale had not been advertised in conformity with the conditions contained in the power of sale, and upon that ground reduced the sale.

BALGARNIE (GEDDES' TRUSTEE) v. GEDDES.—March 16.

Inhibition—Recall.

This was a petition by Mr J. H. Balgarnie, trustee on the sequestrated estate of William Geddes, for recall of an inhibition which had been used on the dependence of an action of separation and aliment at the instance of Mrs Geddes against her husband. The ground upon which the trustee asked recall of the inhibition was that he had sold the estate of Highfield, in the county of Ross, belonging to the bankrupt, and had bound himself to clear the record of all incumbrances. The application was opposed by Mrs Geddes on the ground that the trustee had no title or interest to ask the recall of the inhibition, as his own title to the bankrupt's heritage, and that of a purchaser from him, would not be affected by it, the Bankruptcy Act of 1856 containing express provisions to that effect. Mrs Geddes further stated in her answers, that she had an interest and title to maintain the inhibition as against Mr Geddes, as the trustee at present holds a surplus of L.300, after paying in full all the creditors ranked on the estate, besides heritable subjects which it would be unnecessary for him to sell, and which would have to be reconveyed to Mr Geddes.

The Lord Justice-Clerk—An inhibition is a personal prohibition addressed to a debtor directing him not to sell. The inhibition here applies to Mr Geddes, and not to the trustee. The Bankruptcy Act is also a sufficient answer to the application. Mrs Geddes is entitled to maintain her inhibition, whatever the effect of it may be.

The petition was dismissed with expenses.

RAMSAY'S TRUSTEES v. SOUTER, *et e contra*.—March 19.

Agent and Client—Lender—Expenses.

These were conjoined actions, the one of count, reckoning, and payment, at the instance of Miss Ramsay's trustees, against Mr Souter of Banff, and the other of payment, at his instance, against them. The actions originated in disputed agency on the part of Mr Souter, the trustees maintaining that certain charges in the accounts rendered by him were not incurred in their employment, and that they were consequently not liable therefor. Mr Souter having had certain intromissions with the trust funds, and having a balance thereof in his hands, the trustees, by minute of meeting dated 1st November 1858, 'having every wish to avoid judicial discussion, authorize an offer to be made to Mr Souter of one hundred guineas in full of all the professional accounts rendered by him, or which he may still claim, against the trust.' This offer, which was made without prejudice to the plea of no employment, was communicated to Mr Souter on 3d November 1858. Having declined to accept it, an action of count and reckoning was brought against him; he on the other hand bringing an action for payment of two of his three business

accounts against the trustees. The actions were conjoined, and after a very full inquiry, the result on the accounting between the parties was that, after allowing Mr Souter credit for the whole amount of the accounts found due to him (L.76), the balance was in favour of the trustees to the extent of L.21. Mr Souter was accordingly decerned to pay that sum in the trustees' action, and in his action the trustees were assolizied. The case having been enrolled to discuss the question of expenses, the trustees, in addition to the argument that, having been successful on the merits, they were entitled to their expenses, founded on the offer of L.105 made to Mr Souter before the actions were raised; and Mr Souter—disputing the fact that the minute had been communicated to him—also argued that it was incompetent to found upon it as it had never been put into process and was not a judicial tender. The Lord Ordinary (Kinloch) pronounced the following interlocutor:—‘Allows the pursuers, Ramsay's trustees, to lodge a minute, setting forth articulately, and without argument, the tender alleged to have been made by them to the defender, Souter, before the conjoined processes were raised, and that by Friday first.’ A minute was accordingly given in, setting out the terms of the trustees' offer before-mentioned. Against this interlocutor Mr Souter reclaimed.

The Lord Justice-Clerk said—A tender was a judicial offer to concede something demanded by the adversary, made after process was in dependence. Proper tenders were of two kinds:—First, the defender might admit that a part of the sum claimed was due; if so, he would make a tender thereof on record. Second, the defender, without admitting that anything was due, might be willing to pay something for peace; if so, he would tender what he thought proper with that object, and such tender was generally, though perhaps not inflexibly, made by a minute put into process. But here there was no proper tender at all, but instead, an offer or settlement before proceedings had been instituted, and before any expense had been incurred. Now it was the inveterate practice of the Court, according to his (the Lord Justice-Clerk's) experience both at the bar and on the bench, that such an offer might competently be considered by the Court with reference to the question of the expenses which had been incurred after the offer was made. At the same time, he did not approve of the course the Lord Ordinary had taken in ordering the minute to be lodged; and he would therefore propose that they should recall the interlocutor, and remit to the Lord Ordinary to consider and give effect to the offer of settlement made, and now admitted to have been communicated by the trustees to Mr Souter.

Lords Cowan, Benholme, and Neaves concurred.

English Cases.

MARINE INSURANCE.—L., the insurance broker of plaintiffs, by their direction, applied to the V. Insurance Company to insure a vessel of plaintiffs for a year. The agent of the company initialed the slip for L.1000 on certain terms. The company debited L. with the amount of the premium, and plaintiffs paid L. the amount. The policy was afterwards, in accordance with the terms agreed upon, filled up by the company in their office in the absence of L. and of plaintiffs, and was signed and sealed by two of the directors of the company, and was retained in the office according to their usual practice, until the assured or his broker should send for it. When the time came for paying the premium, the company sent a debit note to L., containing the premium on this policy charged against him. The clerk of L. who received the debit note stated that no premium was due. The company then sent the policy to L.'s clerk, who stated that it had been put forward in error, and requested that it should be cancelled. Thereupon a memorandum of cancellation was indorsed on the policy by the company. L. was charged by the company with the stamp and nothing else, and the policy was handed to L.'s clerk, that he might get a return of the stamp duty upon it. Plaintiffs had never authorized L. to cancel the policy, nor did they know that he had done so. The ship afterwards being lost, plaintiffs brought an action against defendant, the chairman of the company, on the policy; and it was held, by the Court of Exchequer Chamber (Blackburn, J., and Mellor, J., *dissentientibus*), that the action was not maintainable, as on the facts stated the policy never was perfectly delivered as a deed, so as to constitute a binding instrument between the parties.—(*Xenos v. Wickham*, 33 L. J., C. H. 13.)

NEGLIGENCE.—Accidents may be of such a nature that negligence may be presumed from the mere fact of the accident; the presumption depending on the nature of the accident. The plaintiff, while walking in a street in front of the house of a flour-dealer, was injured by a barrel of flour falling upon him from an upper window: *Held*, that the mere fact of the accident, without any proof of the circumstances under which it occurred, was evidence of negligence to go to the jury in an action against the flour-dealer, the declaration alleging that the plaintiff was injured by the negligence of the defendant's servants.—(*Byrne v. Boadle*, 33 L. J., Ex. 13.)

NUISANCE.—Defendant was the lessee of a building divided into two distinct dwellings, the outer door of the lower opening upon a street made on the original level of the ground, and the outer door of the upper opening upon the level of a causeway which had been raised high above the original level, in order to give access to the roadway of a bridge. A space left between the building and the retaining wall of the causeway belonging to defendant as such lessee, the bottom of it was used as an area, and that part above which was on the same level with the causeway was bridged over by a flagging, in the centre of which was a grating which let in light and air to the lower part of the building. The road on the causeway was a common highway to be repaired by the parish, and the flagging and grating had been placed where they were at the time of making the causeway, and before defendant became lessee, and they had been dedicated to and used by the public as part of the highway before 5 & 6 Will. IV., c. 50, and they continued to be so used, although there was a flagged foot-pavement between them and the carriage-way. Defendant underlet the building, and having distrained for rent on the goods of some lodgers who occupied the upper dwelling, a crowd was collected on the flagging and grating. A. B., who was

passing at the time, having been beckoned to by one of the lodgers, endeavoured to get to the door; but in doing so he stepped on the grating, when it and a portion of the flagging gave way, and he fell through into the area below, and was so killed. The giving way of the flagging and grating was caused by its insufficiency, and by the extraordinary crowd pressing upon it at the time. It was held, defendant was not liable to an action for damages by the administratrix of A. B., whether the passage over the area was a private or public way; since if it was a private way, the occupier and not the landlord of the building would be liable; and if it was a public way, the public, and not defendant, were bound to maintain and repair it.—(*Robbins v. Jones*, 33 L. J., C. P. 1.)

FACTORY.—T. was owner of premises in M., in which he carried on the manufacture of cotton sewing thread; he also had premises in L., to which he was in the habit of sending the thread in hanks, and where it was wound by machinery moved by steam-power, firstly on to cops, and secondly on to spools. No other process except this particular winding was carried on at L. It was held, these latter premises were a mill or factory within 3 & 4 Will. IV., c. 103, s. 1, which prohibits the employment of young persons in the night, and also within 7 & 8 Vict., c. 15, ss. 27, 73, by which the occupiers of factories are ordered to keep registers of all young persons employed by them in their factories, and that T. was liable to the penalty imposed by the latter Act for the offence of not keeping such a register.—(*Haydon v. Taylor*, 33 L. J., M. Ca. 30.)

FORGERY.—Prisoner employed a photographer to counterfeit Austrian bank-notes, directing him to take an impression of the note on a plate of glass by means of the photographic process, and then to get it engraved on metal or wood, so as afterwards to strike off the forged notes. The photographer accordingly took off on a glass plate a 'positive' impression of the note, and showed it to the prisoner, who was arrested while inspecting it. The impression on the glass was a mere shadow of the note, easily washed off until fixed, and no impression could be taken from it, but from it a 'negative' could be made, and then from the negative copies of the note could be printed, or an engraving could be prepared. It was held, the prisoner was liable to be convicted, under 24 & 25 Vict., c. 98, s. 19, of the offence of, without lawful authority or excuse, making upon a certain plate an undertaking for the payment of money, purporting to be an undertaking for the payment of money of a foreign state.—(*R. v. Rinaldi*, 33 L. J., M. Ca. 28.)

GAME.—By section 2 of 25 & 26 Vict., c. 114, it shall be lawful for any constable, in any highway, etc., 'to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun,' etc.; and should there be found any game or such article or thing as aforesaid upon such person, etc., to seize and detain such game, article, or thing; and then such constable, etc., may apply for a summons, etc. A constable actually saw a person with a gun in his hand, on a public footway, in the act of picking up a rabbit which another person threw to him out of the enclosed land adjoining, and upon the spot at which a gun had just been fired; the person ran away and escaped for a time; and it was held, that an actual search was not necessary to lay a foundation for the right to apply for a summons, and to proceed to a conviction under the above section.—(*Hall v. Knox*, 33 L. J., M. Ca. 1.)

THE

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BIOGRAPHICAL SKETCHES OF THE SENATORS OF THE COLLEGE
OF JUSTICE.

No. X.

AFTER a considerable interval we resume these Sketches with a notice of SIR GILBERT ELLIOT of Minto. Sir Gilbert was the son of Gavin Elliot of Midlem Hill, a small proprietor in the county of Roxburgh. Before he came to the bar he practised for some time as an agent; and in that capacity he, in 1679, conducted the defence of the well-known Mr William Veitch. After Veitch's condemnation, Elliot laboured most zealously to obtain a commutation of the sentence of death. He applied personally to the Earl of Shaftesbury, and distributed copies of the petition to the members of both Houses of Parliament. Shaftesbury took up the case keenly; but the King long refused to accede to his intercession. 'Upon this,' says Veitch (Memoirs, p. 100), 'the Earl of Shaftesbury told his Majesty, that seeing the petition of so many of the greatest peers in England now standing before him for a thing so just and equitable could not be granted, the new Parliament for inquiring into the Popish plot was now sitting down; and no person that they found guilty, Presbyterian or other, should escape death, if the Parliament would take his advice, and the lords now before the King; and then his Majesty should have pears for plumbs.' The upshot was that the sentence was remitted. In after years Mr Veitch was minister at Dumfries, where Sir Gilbert, then Lord Minto, used frequently to visit him. 'On these occasions,' says M'Crie, in his Memoirs of Veitch, 'his Lordship was accustomed facetiously to say, 'Ah! Willie, Willie, had it no' been for me, the pyets had been pyking your pate on the

Nether Bow Port ;' to which Veitch replied, ' Ah ! Gibbie, Gibbie, had it no' been for me, ye would ha'e been yet writing papers for a plack the page.' It was not, however, merely by acting professionally on behalf of the persecuted clergy that Elliot showed his sympathy with the revolutionary party. He went the length of going over to Holland with Argyll, acted as clerk at several of the meetings of the friends of the Prince of Orange held in Rotterdam, and afterwards accompanied the ill-fated Marquis on his expedition to Scotland. For all these things he was, in July 1685, tried in absence, and, along with Sir J. Stuart and Denholm of Westshiels, convicted of treason, and forfeited. Not long afterwards, however, he obtained from the King a remission of his sentence—on what ground does not very well appear. Accordingly, in November 1687, he applied to be taken on his trials as an advocate. Being, as usual, remitted to the private examiners, they, as Fountainhall relates (i. 475), ' stumbled to meet with him, till he first showed his remission, least it might infer converse against them.' Their scruples having been removed, he was taken on his trials along with Walter Pringle and Thomas Wallace. The examination took place on 10th December : Pringle and Wallace passed, but on Elliot the report was, ' nott sufficiently qualified' (Faculty Records, i. 128). He had found the title of the Digest *de compensationibus* too much for him. But he was determined not to be repulsed, and accordingly presented himself again for examination in July 1688. This time the title *D. de rebus creditis* was assigned to him, and upon it he passed. He was examined the second time along with Mr James Leslie ; and the Faculty Minute, which is signed by Sir George Mackenzie (then Dean of Faculty as well as Lord Advocate), bears that the Faculty resolved ' that they will allenary examine one intrant in one day for the future.' One cannot help suspecting that, after all, Elliot had not displayed much more acquaintance with the title *de rebus creditis*, than with that *de compensationibus* ; and that it was only after a very long and wearisome examination that the Honourable Faculty had been able to pass him. It is curious to think what issues were dependent on that judgment as to an intrant's knowledge of a title of the Digest. Had the Faculty been as inexorable on Mr Elliot's performance on the title *de rebus creditis*, as they had been in regard to his performance on the title *de compensationibus*, his family in all likelihood would never have been ennobled ; and the many good things, at home and abroad, which his descendants now

enjoy through the kindness of our present Foreign Secretary, would probably never have fallen to their lot. But it was to be as it has been. Accordingly, Elliot was admitted advocate in November 1688. After the Revolution his forfeiture was rescinded by Act of Parliament; he also obtained the honour of knighthood, and the more solid appointment of Clerk to the Privy Council. His practice at the bar became very extensive, and his emoluments must have been very large. In 1700 he was created a Baronet, and in 1705 an Ordinary Lord of Session, as Lord Minto. After discharging his judicial duties with the greatest fidelity, he died in 1718. His son, Sir Gilbert, was a judge both of the Court of Session and Court of Justiciary; his grandson was a Lord of the Admiralty, and his great-grandson, created Baron Minto in 1797, was appointed Governor-General of India in 1807. Since that date the fortunes of his family have not fallen off.

SIR ALEXANDER OGILVY of Forglen was a son of the second Lord Banff. The interest of his family secured him a seat in the Scottish Parliament, which he retained till the Union in 1707. He appears to have been occasionally rather indiscreet in his speeches; and accordingly he and Lord Belhaven were, in 1703, ordered into custody for their use of unparliamentary language. The discipline of the Sergeant-at-arms of the period soon proved salutary; and having, upon their own petition, been brought to the bar, and there made a humble apology for their conduct, they were allowed to resume their places. In 1706, Sir Alexander (who had been created a Baronet in 1701) was appointed an Ordinary Lord of Session, and took his seat as Lord Forglen. He continued upon the bench till his death in 1727. His life was not a very eventful one, and we should not have considered it necessary to notice him at all, had it not been for a very curious litigation which took place between him and Forbes of Tolquhon. Fountainhall's account of the proceedings is so quaint, that we quote from it very freely. Under date March 28, 1685, he notes (Decisions, i. 359):—

'Sir Alexander Forbes of Tolquhoun pursues Ogilvy of Forglen, brother to the Lord Banff, for taking away a gilded Mazer cup out of his house, *rei vindicatione* for restitution, or for the value. The libel was admitted to probation, and witnesses were led thereon, who proved nothing. It was at length discovered that Tolquhoun himself had some years ago given this cup to a goldsmith in Aberdeen to be mended; and he having forgot, it was lying there unrelieved, for not paying a half-crown for it. The Lords getting notice of this, proceeded to advise the cause, though Tolquhoun by a bill craved they might delay till they

examined witnesses who had laid it in beside that goldsmith, seeing Forglen might have shuffled it in there; and the Lords finding it not proven, they assoilized Forglen, and ordained Tolquhoun to pay 1000 merks of expenses, *tanquam temere litigans*, and allowed Forglen to pursue him at Privy Council or elsewhere for defamation.'

Forglen was not slow in acting upon the suggestion of the Court; and accordingly we find Fountainhall relating (i. 362), under date April 30, 1685,—

'Ogilvy of Forglen pursues Tolquhoun for defamation, in making him the thief and resetter of his silver cup, as mentioned *supra*, 28th March 1685, and insisting, after Forglen had sworn he never took it, which was to rub the reflexion of perjury on him. Tolquhoun being absent on the pretence of sickness, and his calumniousness being clearly made appear, the Council fined him in 20,000 merks, the half to the king's cash-keeper, and the other half to the party, for reparation of his honour and damages, and ordained him to crave the Lords of Session pardon. This was thought a severe sentence, for Tolquhoun's action was only *civilis rei vindictio*, and he was fined 1000 merks already by the Session for damages. But on the matter, Tolquhoun's pursuit was for theft, which, in a landed man as Forglen is, was no less by our law than statutory treason, which mitigates the severity of the fine.'

The King remitted his half of the fine, but the Court enforced payment of Forglen's half, viz. 10,000 merks. Tolquhoun brought a suspension, but the 'Lords found the letters orderly proceeded.'

JAMES ERSKINE of Grange was a son of the tenth Earl of Mar, by a daughter of the second Earl of Panmure. He passed at the bar in 1705; and in 1706, thanks to his family influence, he was, at the early age of 26, appointed to the bench as Lord Grange. In 1710 he succeeded Cockburn of Ormiston as Lord Justice-Clerk. Not content, however, with his speedy promotion as a judge, Erskine resolved to play a prominent part as a statesman also. When he took this resolution in 1734, Sir Robert Walpole was the all-powerful Minister of George II. Erskine belonged to the opposition party, and his hopes of office depended on the Minister's defeat. To aid in accomplishing it, he offered himself as a candidate for the representation of the county of Stirling. But just as he did so, the statute (7 Geo. II. c. 16) was passed, incapacitating Scotch judges from being elected members of Parliament. Hailes (MS. Additional Notes, p. 30) gravely says, that Walpole introduced this measure for the purpose of excluding Lord Grange from the House of Commons. We can hardly think the great English statesman stood in such awe of the untried abilities of the Scottish lawyer. But if he did, the means he took for excluding him proved abortive. The Minister who said that every man had his price would probably

have thought that Grange would not have relinquished his 'two gowns,' with their solid emoluments, for the shadowy hope of parliamentary success. But in this he was, or would have been, mistaken; for Grange at once resigned them all, obtained his election for Stirlingshire, and joined the Opposition. Walpole was, however, far too strong then, both from his Court influence and his parliamentary following, to be dislodged from office; and so the efforts of Erskine and the rest of the Opposition failed. Foiled in his hopes of ministerial preferment, Erskine, at the age of 60, returned to the bar and attempted to reacquire his old position there. But he found that endeavour as vain as his design against Walpole, and after persevering in it for a short time he gave it up. He died in 1754, at the age of 75.

SIR FRANCIS GRANT of Cullen was born in 1660. He came of a respectable Aberdeenshire family, and began his studies at the Northern University. Having distinguished himself there, he resolved to follow the profession of the law; and in order to qualify himself for doing so, he went to Leyden, where John Voet was then teaching in the zenith of his fame. Grant proved no unworthy pupil of his great master, who, it is said, often spoke of him in terms of the highest admiration. Having returned to Scotland, he, in 1689, took part in the Revolution Convention, espousing warmly and advocating most ably the claims of the Prince of Orange. Two years afterwards he passed at the bar with great eclat, and immediately obtained an extensive practice. In 1705 he was created a baronet, and in 1709 he was appointed an Ordinary Lord of Session, under the title of Lord Cullen. He died in 1726. Wodrow's account of Lord Cullen is, as usual, very quaint. 'His style,' he says, 'is dark and intricate, and so were his pleadings at the bar, and his discourses on the bench. One of his fellow-senators tells me he was a living library, and the most ready in citation. When the Lords wanted anything in the civil or canon law to be cast up, or Acts of Parliament, he never failed them, but turned to the place.' In the Biographical Dictionary of Eminent Scotsmen (ii. 533) the following statements are made in regard to Grant:—

'Although acute in the management of the business of others, Lord Cullen has borne the reputation of being a most remiss and careless manager of his own; a defect which seems to have been perceived and rectified by his more prudent and calculating spouse, who bore on her own shoulders the whole burden of the family matters. It is narrated that this sagacious lady, finding that

the ordinary care which most men bestow on their own business was ineffectual in drawing her husband's attention to the proper legal security of his property. was in the habit, in any case where her mind misgave her as to the probable effect of any measure she wished to adopt, of getting the matter represented to him in the form of a 'case,' on which his opinion was requested as a lawyer.'

Our only remark on the story is, that if Grant gave his opinion without a fee, we can believe all the rest quite easily. Of various works written by Lord Cullen, it is only necessary to mention two. The first of these is entitled, 'The Loyalist's Reasons for his giving Obedience to the present Government,' published in 1689. In this treatise, Grant argued the claims of the Prince of Orange on fendal principles, and it is said that its calm and logical reasoning had the greatest possible weight in reconciling the Scottish gentry to the change of Government. The second production to which we refer is, 'A Brief Account of the Rise, Nature, and Progress of the Societies for the Reformation of Manners, etc., in England, with a Preface exhorting the use of such Societies in Scotland.' This tract was published in 1700 for gratuitous distribution, and was probably the first attempt to convey moral lessons to the people in such a form. It was Lord Cullen's sincere desire to better the moral condition of his countrymen; and if he sometimes erred in the means he took for accomplishing this end, he should not be harshly judged, considering the true nobility of his purpose.

DAVID ERSKINE of Dun was born in 1670. After studying at St Andrews, he went to the University of Paris, and remained there some time. He became an advocate in November 1698, and soon obtained an extensive practice. He sat in the Convention of Estates and in the Parliament for several sessions. In November 1710 he was promoted to the Bench, under the title of Lord Dun; and in 1714 he became a Commissioner of Justiciary. The latter of these offices he held until 1744, and the former until his death in 1755. Lord Dun is best known for his 'Friendly and Familiar Advices,' a small volume, published in 1754. These letters or essays are addressed to the judges, advocates, agents, clerks of Court, etc., and advise them in regard to the performance of their respective duties. We propose to give somewhat copious extracts from the 'Advices,' as we are sure they cannot fail to amuse, possibly instruct, the reader. In his 'Advice' to Judges, Lord Dun says (pp. 7, 8, and 19, 20):—

'Then, in reference to himself, the Judge, in his eating and drinking, ought to be sober and temperate; in his recreations moderate, making a right choice of

them ; not to be addicted to gaming with cards or dice : such unlawful recreations are by the Judge to be discouraged, as the occasion of much wickedness, and the woful cause of corrupting many, particularly of our youth. In his habit, the Judge ought to be grave and decent ; in the whole of his deportment, humble, courteous, affable, and meek ; the whole of his conversation ought to be savoury, wise, and edifying : he should be altogether disengaged from all covetousness, ambition, pride, anger, malice, revenge, and such like disorderly passions and affections ; for all, or any of them, being seated in a Judge's heart, will, in consequence, influence his judgment, to the perverting of justice ; and by thus managing the course and tenor of his life, out of judgment, he will thereby be more enabled to conduct himself in the right discharge of his duty when in it. . . . There is no part of duty in the Judge more indispensably necessary, and of greater use, than to give dispatch ; and therefore, for that end, and for preventing unnecessary delays, the Judge is to be painful and diligent in the use of all possible means within his power, to make himself soon to understand the case, and, when understood, to give it all possible dispatch ; for how grievous and hurtful a thing is it to the parties concerned in law-suits, to have them kept up in long dependence ! for, besides the charge of attendance and expense of process, they are withdrawn from their homes and families, and their other more necessary affairs ; their industry and labour, which ought to be employed for the benefit of themselves and others, lies in the meantime neglected ; and all these things do concur to make the administration of justice to them, when delayed, a very dear purchase ; and must, in consequence, bring a great scandal and reproach upon the dispensers of it. . . . And, therefore, for avoiding those evils, the Judge, on his part, is to be very painful and assiduous, and not given to laziness and indolence, but to be always in readiness, upon the application of the parties or their doers, to hear and determine their cases ; as also to oversee advocates, clerks, and all others concerned in the management of processes, that they candidly and ingenuously act their several parts, and with their joint endeavours concur for bringing them to a speedy issue ; and whenever a contrary management is discovered, either in parties or their doers, the same ought, by the Judge, to be severely reprimanded, and the party suffering thereby, his damage fully to be repaired.

In regard to Advocates, he says (pp. 34, 35) :—

'The Advocate, in pleading and writing upon the case, is to study all brevity, that is to say, he is to avoid all unnecessary repetitions and digressions: he ought to speak close and soon to the point in debate ; and, in managing of his argument, to study rather to be succinct and sententious, than to affect superfluity of words and the flourish of eloquence : such rhetorical style being only fit in haranguing and speaking to the populace and mixed multitude, but noways proper from the bar to the bench ; for it is to be presumed that the judges have such knowledge of the principles of law and equity, that they want not to have them cleared up with much rhetoric and long reasoning.'

Some of the Clerks' duties are thus pointedly enforced (pp. 39, 40) :—

'But more particularly, when the case comes under the judge's deliberation, he is then, with great attention, to listen to the judge's reasonings, that he may perfectly understand the meaning of their judgment when pronounced, whether decisive or interlocutory, that, in clerking of it, he may surely, without mistake, hit it : this is the more necessary in the Court of Session, where, by reason of the multitude and great variety of business, the judges have no time and leisure immediately to dictate their judgment to the Clerk, upon their pronouncing of it, but must leave it with the Clerk to write it out : and though, in all cases, particularly those of importance, the Clerk reads it before signing it, in presence of all the judges, yet it may sometimes happen that a day or two may inter-

vene betwixt pronouncing and subscribing, by which means, by the inaccuracy and inadvertency of the Clerk, much time is lost in correcting of his escapes; and, by a wrongous clerking of the judgment, parties are brought to the expense of making new applications for having their errors rectified; yea, from the default of clerking aright the sentence, it may happen sometimes, that in place of having the plea thereby ended, it becomes itself the subject of a new one: it is therefore of great importance to the right administration of justice, that the Clerk be painful, faithful, and distinct in the discharge of the duties of his office.'

Lastly, Lord Dun addresses the Agents thus (pp. 44, 45) :—

'Let me caution the Agent to beware of hounding out and enticing parties to engage in law-suits; which, as said before, is a most abominable practice, though, I am afraid, too common: the Agent, by so doing, presumes too much, and acts without his sphere. His province is not to give counsel upon matters dubious and debateable, but to open the case to the advocate; and in representing of it, to do it fully and truly, without the concealing of any fact or circumstance; and to lay before him all writings and other evidences he is or can be master of, which concerns the case: by doing so, if it shall afterwards appear that the party has been rashly engaged in a suit, the Agent is blameless; but if, trusting to his own opinion, he has been the prompter to it, he is not only highly culpable, but justly chargeable with the parties' damages: and indeed the seeking for and the giving sound and solid counsel, before commencing of the suit, is of greater use, and more necessary, than at any other time whatsoever.'

There are many other Advices to 'monarchs and subjects,' 'men of wealth and riches,' 'the poor and indigent,' 'merchants,' 'the military, both officers and soldiers,' and such like; but the extracts we have given will amply suffice to show the tone and tenor of Lord Dun's once well-known but now nearly forgotten volume.

SIR WALTER PRINGLE of Newhall was the second son of Sir Robert Pringle of Stichel. He came to the bar in 1687, and practised there with much success till his elevation to the bench, as Lord Newhall, in 1718. All contemporary writers speak in terms of the highest praise of Sir Walter's qualities, both as an advocate and a judge. Thus Lord Woodhouselee, in his 'Life of Lord Kames,' (vol. i. p. 31), says :—

'Sir Walter Pringle of Newhall shone with conspicuous lustre in all the more essential qualities of a lawyer and a judge. His great knowledge of jurisprudence, and distinguished eloquence, rendered him for many years a principal ornament of the bar; and his high sense of honour, immaculate probity, and dignified deportment as a judge, accompanied at the same time with the most engaging modesty and diffidence in his own opinions, while they enhanced in the public mind the respect and authority of the Court of which he was a member, have given him a permanent name in the annals of Scottish jurisprudence.'

When Lord Newhall died, in 1736, the Court attended his funeral in their robes of office, or 'formalities,' as the Faculty minutes bear,

—a tribute of respect which, it is said, had never before been paid to any Ordinary Lord. A motion was also made in the Faculty, that the members should attend the funeral ‘in a body, with their Dean, and in their gowns.’ After a discussion, the following resolution was come to: ‘The Faculty, considering that there is no precedent of their having attended at the funeral of any of the Lords of Session in the form now proposed, and foreseeing several consequences that may hereafter follow, and draw them into inconveniences, and particularly bring them under the dishonourable necessity of paying extraordinary outward compliments in future times, where equal merit may not call for the same inward respect, resolve, and have resolved, not to attend the funeral with any such transient formalities, but to give this more lasting testimony of their highest esteem and honour for so distinguished a merit and character.’ This testimony consisted of a glowing eulogium on the deceased judge, from the pen of the Dean, Mr R. Dundas, afterwards Lord President, engrossed in the Minutes of Faculty (i. 649).

Hamilton of Bangour wrote the following epitaph on Lord Newhall, in which, if the rhetoric of the undertaker does occasionally appear, there is far more simple truth also than is usual in such compositions:—

‘To fame let flatt’ry the proud column raise,
And guilty greatness load with venal praise;
This monument, for nobler use design’d,
Speaks to the heart, and rises for mankind;
Whose moral strain, if rightly understood,
Invites thee to be humble, wise, and good.
Learn here of life, life’s ev’ry sacred end,
Hence form the father, husband, judge, and friend:
Here wealth and greatness found no partial grace,
The poor look’d fearless in the oppressor’s face;
One plain good meaning through his judgment ran,
And if he erred, alas! he erred as man.
If, then, unconscious of so fair a fame,
Thou read’st without a wish to be the same;
Though proud of titles, or of boundless store,
By blood ignoble, and by wealth made poor,
Yet read: some vice, perhaps, thou may’st resign,
Be even that momentary virtue thine;
Heav’n in thy breast here works its first essay,
Think on this man, and pass unblamed one day.’

—*Poems*, p. 99.

A POINT IN THE LAW OF MASTER AND SERVANT.

In a recent number we treated of a point under the statute of uniformity of weights and measures, whereon a difference of opinion and practice unfortunately existed in different Sheriff Courts. We shall now allude to another subject of discord in the law of master and servant, which is one of every-day occurrence, and where such diversity of judgment, of course, must be productive of very serious evils.

A servant sues his master for wages and board wages (more properly board), because of unjustifiable dismissal between terms.¹ The dismissal being admitted or proved, and not being justified, the next question is, the amount of reparation to be awarded the servant. In some Sheriff Courts the rule is to give the wages for the period earned, with such addition, in name of damages, as may be ascertained to be fairly due to the servant as loss sustained by reason of the master's breach of engagement. In calculating this amount in some courts, the servant is required to state his earnings since the time of his dismissal, up to the time of judgment being given; and for the future a sum is given likely to meet the loss prospectively to be sustained. In other counties the rule is to award the full amount of wages and board for the whole period of the engagement. It does not matter, in this view, how early or how late in the term the dismissal has occurred—how much has been actually earned in the defender's service, or how much the servant has earned since he left that service; nor the particular circumstances attending the dismissal, whether it was an aggravated case, or one where there has been a degree of fault on both sides—which latter is in general the fact. All such inquiry is considered extraneous, and the master is held liable for the full equivalent of wages, as if the whole service had been given. The case is viewed not as one of damages for breach of contract, but as one for wages on its fulfilment.

The fallacy in this last line of decision is in viewing the case rather as one of punishment for delict, than of civil reparation for mere breach of contract. No doubt the remuneration which the servant would have received had the contract been permitted to

¹ A very common defence in this class of cases is a denial of the dismissal; but alternatively, that if proved, such act was justified by the conduct of the servant. This loose form of pleading is of very doubtful expediency, if at all relevant.

run its course, and the equivalent services given, is an important element in the ascertaining the amount of damages. Such forms the *maximum* of the servant's loss, but it can never be converted into the *minimum* of his damages. That falls to be decided as a jury question—What is the actual loss and damage sustained by the servant, by reason of the breach of contract on the part of the master?

Lord Stair observes: 'Reparation is either by restitution of the same thing in the same case that it would have been in if it had remained with the owner; or where that cannot be, by giving the like value, or that which is nearest, to make up the damage;' and in a note to the passage by Mr Brodie, he observes: 'In a civil action, the question is, What is the amount of the damage sustained?'

In like manner, Mr Erskine lays down the law, that 'in all obligations concerning things lawful, and in themselves possible, the obligant who fails in the performance of his part must make up to the creditor *the damage he has sustained through the non-performance. But no damage which is remote or indirect ought to enter into the computation.*'—B. 3, T. 2, s. 86.

Upon the special question under the contract between master and servant, Mr Erskine states the law thus: 'That if a master dies, or without good reason turns off a servant who was entitled to maintenance at bed and board in his family before the term agreed on, the servant has *a right* to his full wages, and also to his maintenance till that term.'—B. 3, T. 3, s. 16. But Mr M'Allan, in a note to this passage, remarks: 'From the wages due by the master on dismissing a servant without cause, a *deduction must be made of any wages he may or might have earned during the remaining period of his engagement.*' The editor refers for his authority to the case, 20 June 1750, *Rae*, Mor. Dic. 13989. Lord Ivory in like manner, in his edition of Erskine, in a note to the same passage, observes: 'As to the mode of estimating damages in these cases, see the case of *Rae.*' In that case, a servant engaged for a year was dismissed at the end of the second week. The Justices 'found it presumed that the pursuer was, or might have been, some way usefully employed for the fifty weeks he was out of service during the time libelled; and found that he could not be entitled to the same wages during that time that he might have been entitled to had he been at work, and therefore modified the wages to the half.' The Lord Ordinary refused a bill of advocation, and the Court unanimously adhered.

Lord Kilkerran, in reporting the case, remarks that 'the servant *seems* to have much to say for *more* than his wages, as he must feed himself *till he get other employment*; nor is it *clear* that he is bound to seek other employment. *But all cases of that kind must depend on circumstances.*' It may be remarked, that in the case of *Rae* the servant was specially engaged for a particular department in a glass-work, which may have unfitted him for general employment as a common labourer. Sheriff Tait, in his Treatise on the Office of Justice of Peace, observes: 'If the servant turned off get into another service before he brings the matter into a court of law, the sum awarded will be restricted *to the wages which he has lost, and the expense to which he has been put whilst out of service.* If the action be brought recently after the servant is dismissed, so that it cannot be determined whether he has any reasonable expectation of getting into another service, perhaps the proper course is to decern, not for a gross sum, but for a certain sum weekly or monthly alternately until the next term, *or until the servant find a service.* If the servant be turned off on account of the bankruptcy of his master, he is no doubt entitled to damages; but he cannot expect to be allowed to remain idle during the whole term, and thus be a burden upon the creditors. The judge will inquire into his probable gains, and his reasonable expectations of finding a new employment.' Mr Tait refers to the case 17 Nov. 1790, *Puncheon v. Hay's Trustees*, where an engineer in a distillery, engaged for seven years, and dismissed on account of the bankruptcy of his employers in the fourth year, claimed the full salary for the remaining years, 'but was found entitled only to his salary for such time as he remained unemployed.' The learned author refers also to the case of *Rae*, above recited, and concludes his observations by the remark, 'Upon the whole, it appears that if the master, without due cause, refuse to allow his servant to remain during the covenanted time, he will be subjected *in such damages as in the whole circumstances of the case appear reasonable* (p. 464).

Mr Blair, in his Treatise on the Office of Justice of the Peace (1834, p. 300), adopts the opinion of Mr Tait, observing, 'If the master dismiss the servant without good cause, the latter will be entitled to full wages (and board when that is due) till the next term, *or till he get a place.* The servant, in general, is held entitled to wages for the period *during which he was out of work.*' Mr Baird, in his work on Master and Servant (1840, p. 54), observes:

'Where the dismissal cannot be justified, and where it cannot be ascertained whether the servant has any reasonable expectation of getting another place, the usual course of the Court is to decern for a specific sum, payable to the servant either weekly or monthly till he finds a situation, or failing that, till the term of his engagement. To give the servant a decree for wages and board, which enables him instantly to recover payment, would give him an advantage; for he might recover payment and thereafter remove to a distance and obtain another situation, and thus gain double wages and board for the remaining part of the term. If the servant, after dismissal, get into another place before bringing the matter into a court of law, the sum awarded will be restricted to *the wages which he has lost, and the expense to which he has been put while out of place.*' 'It is a vulgar notion among servants, that it affects their claim against the master for improper dismissal, their accepting of any situation during the currency of the contract; but it does not. If it can be shown that a servant could have been usefully employed, or was offered employment but preferred idleness, his claim on that account is not so favourable.'

Mr Wm. Bell, in his Law Dictionary (1838), observes, 'Where the master dies, the servant is entitled to wages and board wages to the next term. The same happens where the master turns off a servant between terms. *But in these cases, as the servant is at liberty to employ his time, some allowance ought to be made according to circumstances.*'

In England, domestic servants being engaged by the month, the question is not of any great importance, and does not appear to have arisen in any of the law courts there.

The principal authority for the doctrine of full wages and board, is that of Mr Fraser, in his valuable Treatise on Domestic Relations. In the outset he observes: 'The amount of damages has generally, by the later decisions of the Court, been *limited* to the wages to the end of the engagement; and in the case of servants whom the master is bound to lodge and feed, to board wages to that period also. There is, however, no ground for *confining* the damages awarded to the servant to wages or board wages, nor for making them up to that sum, *if a less amount will afford sufficient reparation for the loss sustained. The master will be subjected in such damages as from the whole circumstances of the case appear reasonable.*' The learned author refers to Mr Tait and several unreported

cases in support of this sound view of the law. But the case of *Longmuir*, 16 March 1833, to which he also refers, is not an authority in point, as the action there was for defamation and wrongous apprehension, and not for breach of contract.

Mr Fraser, however, proceeds to combat the 'practice sometimes adopted, of taking off from the servants' wages and board wages to the next term, any sum he may obtain by getting into other service.' He states that one learned author (not named) expressed surprise at the practice. But if the ground of the surprise be merely 'where a master unjustifiably dismisses a servant, it would evidently be giving a premium to wrong, to enable him to violate the contract without paying more than the value of the actual service he has received;' no such practice is believed to exist. The servant always has been held entitled to more than the wages actually earned, and to the extent of his actual loss liberally estimated. Mr Fraser quotes the opinion of Baron Hume, in the case, 13 June 1806, *Stewart v. Richardson*. He unfortunately omits to notice, that in that case the Lord Ordinary, whilst awarding a sum *less* than what was claimed by the servant, reserved to the defender, the master, his 'action of repetition, in case he shall be able to instruct that the pursuer is actually in employment, and earning wages in return for service.' The Court, however, 'remitted to the Lord Ordinary to inquire whether Richardson earned wages elsewhere for the term from Martinmas 1805.' The quotation as given by Mr Fraser is from the reporter, in answer to a plea that the servant was 'entitled to *no damage* if the servant gets immediately into place for the term, where he has equal wages and other advantages.' And the learned author also omits the conclusion which the Baron reached on the opposing argument, which is in these words: 'But still in the main the decree is for a sum *nomine damni*, and not in *pœnam*; and it should seem that it *ought therefore to be taken into consideration in taxing it, what the servant has earned in the way of wages for the term elsewhere.*' The reporter also notes the opinions expressed in an unreported case in 1808, subsequent to those of *Stewart* and *Richardson*. Lord Meadowbank observed: 'I think the interlocutor right, provided it is shown that damage was truly suffered. But if a servant get instantly into as good a place, he suffers no damage, and no indemnity can be due.' Lord Balmuto: 'I agree with Lord Meadowbank, that if he got into a place with better wages by

means of the breach of bargain, he profits instead of losing in that case.' Baron Hume sums up the whole matter in these words: 'No decision was given, for the point was not fully before the Court. One difficulty is to arrange this matter when the decree comes to be given early in the term, and while it is uncertain as yet what the servant's situation may come to be' (Hume's Dec., p. 391). On the whole, therefore, instead of the Baron being an authority for no inquiry and no allowance of wages earned after dismissal, he is distinctly on the other side.

Mr Fraser, after quoting part of the passage from Hume's reports of the case of *Stewart*, proceeds to state, 'that the decisions of the Court have been in accordance with these opinions.' The learned author first notices the cases of *Rae* and *Stewart* above mentioned, where the opposite opinions prevailed. The next case cited is that of *M'Lean v. Kyle*, 4 Dec. 1813, Fac. Coll. That case was of a gardener at the yearly wages of L.39 and advantages, but no board, and the question was entirely as to warning being necessary, and the amount of damage was not raised; and therefore the case is one neither as to the nature of the service, nor is the judgment given an authority on either side. The report does not state that 'the servant was found entitled to the full year's wages *without deduction*.' The next case referred to by Mr Fraser is 6 June 1829, *Muir v. M'Kenzie*. In that case, the pursuer was a grieve or farm overseer; and the question raised was, whether on dismissal he was entitled to wages for the whole year or for the half-year. The question of deductions was not raised. The next authority referred to was a jury case, *Anderson v. Wishart*, 17 July 1818, 1 Murray, 429. The engagement of the servant was as an overseer, at a salary of L.42 per annum; and there was a second issue sent to the jury of defamation. The jury gave L.200 of damages and L.95 for breach of contract. The question of deductions was not, and could not, be raised under the issues. It is important to notice, that 'at the trial one of the witnesses stated, that since the defamatory statements made by the master, there were probably several situations to which he could have recommended the servant, and mentioned one which he could have given him, but did not recollect the value of it.' This obviously tends to show that it would have been relevant to prove that the servant could have got another situation had the master's evil speaking not prevented this. The next case referred to is 27 June 1827, *Morrison v. Allardyce*, 2 Shaw, 434. This was

the case of a cook-maid dismissed on the very term-day. The issue was, whether warning was necessary according to local usage, and the question of deduction was not raised. The same remark applies to the prior case of a cook reported by Hume, 384, 3 June 1801, *Gunn v. Ramsay*; as also to that of *Thomson v. Douglas*, 1807, Hume 392, which was the case of a gardener. The case of *Bachelor v. M'Gilvray*, 4 March 1831, was that of a salesman to a Mercantile Society; and there also no question of deduction was raised.

In all the cases referred to by Mr Fraser, it will be thus noticed that in no one was the question of deduction raised, except in those of *Rae* and *Richardson*, where the deduction was sustained. In all the subsequent cases, with two exceptions, the pursuer was in a situation higher than a domestic servant. In this class of cases employment is at no time of easy obtainment, and next to impossible when there has been dismissal between terms. In ordinary domestic service there is little difficulty at any time of obtaining service when sought for.

All authorities, including Mr Fraser, on the authority of the case of *Puncheon*, agree that in the case of the dismissal of the servant in consequence of the death or insolvency of the master, the former is only entitled to a reasonable portion of his wages for such time as may enable him to find other employment. There is no very substantial distinction between that class of cases and those where the servant has been dismissed between terms, on grounds which the master may not be able to satisfy a judge was altogether sufficient to justify the dismissal.

If the principle be sound, that dismissal by a master without good cause must necessarily, and in all cases, impose on him the payment of wages and board to his dismissed servant for the full period of the engagement, without the equivalent rendering of any service, then it ought to be carried out to its fullest extent. If good under one contract of service, it must be equally so in all, though with the same servant. It follows that a fortunate servant, by his latent talent, may qualify himself for unjustifiable dismissal several times within the same term, and the earlier in its currency the more lucrative. Thus, for the greater part of a year he may be acting 'the gentleman at large,' drawing wages and board, at one and the same time, from several of his late less fortunate masters. The knowledge of the existence of such a golden rule for

rewarding discarded servants must have a very exciting though not a very beneficial effect on the mind of the servile classes.

The principle of estimating actual loss and damage not according to fact, but on theory, has fortunately found place as yet in no other contract. Where there is a breach by the seller in a contract of sale, the buyer's award of damage sustained has nothing to do with the *cumulo* price stipulated to be paid; but he is bound to go to the market and supply himself with the same quantity and quality of the article, and the difference of the price is the criterion of his damage. In a falling market he would have no claim, because he had suffered no loss, but obtained a benefit. So, too, in the contract of lease, a violation on either side is not blindly estimated by the amount of rent; but the difference between what rent the landlord obtains for the subjects, and what was stipulated to be paid him, is the true measure of the landlord's claim, and the actual loss sustained by the tenant where the breach is on the side of the proprietor.

There appears no peculiarity in the contract of service to confer on one of the contracting parties a greater privilege than on parties to other contracts of location, or on the master, the other party to the same contract. If the servant deliberately deserts, he justly forfeits his wages actually earned. If he leaves under some mutual quarrel, there may even be room to award him all or part of the wages earned. See case 22 Jany. 1861, *Gibson v. McNaughton*. But it would be a strange principle which would declare against the servant full forfeiture of the wages actually earned, and liability to the master for a sum equivalent to the remainder of the wages for the year, though it may be proved that the master had immediately supplied himself with a better servant, and at a less wage, and therefore really sustained no actual loss, but obtained a benefit. Legal and logical analogy leads to the result, that where the servant deserts, the measure of the master's damages is neither more nor less than the wages and board of the servant, put in the place of the deserter. If the master in default has to pay wages and board without getting any equivalent, then, on the same principle, when it is the servant who is in fault, the master should obtain service without the return of wages and board. Thus blindly to lay down a rule that the wages on either side must be the measure of damage, and neither more nor less, is to introduce the Procrustean couch, and

stretch or strain every case to its exact dimensions. It is humbly thought that the older rule of judging every case of breach of the contract of service according to its own circumstances, and awarding damages equivalent to the loss actually sustained by the party seeking reparation, is that which is more consonant with sound sense and mutual justice.

We feel much confidence, that on a review of the authorities, and none more weighty than that of Baron Hume, when his opinion is taken as a whole, the decisions in *Rae* and *Richardson* ought to rule all cases under the contract of master and servant, especially in the class of domestic servants. We disclaim all allusion to the practice in the King's Bench of Macedon, when we say we are quite willing to abide an appeal on the point from Mr Fraser as the learned author, to Mr Fraser as the distinguished local judge.

CASE LAW OF THE SESSION.

IN pursuance of the plan commenced at the end of last summer session, we proceed to lay before our readers our sessional retrospect of case law, in which, without any attempt at systematic arrangement, we shall group together those cases which illustrate each other, or which belong to the same leading category of rights.

I. HUSBAND AND WIFE.—The case of *Cruickshank* or *Turnbull*, 14 Jan. 1864, settles a question of considerable importance in the construction of the Conjugal Rights Act. By the 1st section of the Act, a wife 'deserted by her husband' is entitled to apply to the Court by petition (which comes before the junior Lord Ordinary in the first instance), 'for an order to protect property which she has acquired, or may acquire, by her own industry after such desertion, and property which she has succeeded to, or may succeed to, or acquire right to, after such desertion, against her husband, or his creditors, or any person claiming in and through his right.' It is then enacted that, after the usual intimation, the Lord Ordinary shall require evidence of the desertion; and on being satisfied thereof, and that the same was without reasonable cause, shall pronounce an interlocutor, giving to the wife protection of her property as aforesaid against the husband, and all creditors or persons claiming under or through him. The question was, whether the 'desertion' mentioned in the statute must be of the same kind that would en-

title the petitioner to a divorce. The First Division, overruling Lord Ormidale's judgment, held that the word must be construed in its ordinary acceptation; and in the particular case, where the husband had gone off to America without giving his wife notice, though they had since corresponded, held that desertion was sufficiently established. They further held, that the going abroad to avoid the diligence of creditors was not a reasonable cause of desertion. It is satisfactory to know that the Court has been able to construe this humane provision in a manner which is evidently consistent with the intention of the Legislature. Had the remedy been restricted to cases of 'wilful and malicious' desertion under the statute of 1573, we should have had a litigation to determine what was the intention of the husband in going abroad in every case, the expense of which would have been greater than the worth of the application.

The House of Lords, as might have been expected, have reversed the judgment of the Second Division of the Court sustaining the jurisdiction in the divorce case, *Pitt v. Pitt*. It is curious to observe how the course of decisions has fluctuated on this apparently simple question. The old Commissary Court had no scruples on this subject of jurisdiction; they unhesitatingly granted decrees of divorce at the suit of either party, if only the defender had been resident within the territory for forty days. The House of Lords, in the celebrated case of *Warrender*, not only sanctioned this ground of jurisdiction, but by the aid of the principle of derivative domicile, extended it so that the husband, if pursuer, was entitled to found upon his own temporary residence to the effect of establishing jurisdiction in a suit against his wife. Such at least was the express *dictum* of Lord Brougham, though, as Sir George Warrender was really domiciled in Scotland, the observation was not necessary for the decision of the case. In *Ringer v. Ringer* or *Churchill*, a majority of the whole judges of the Court of Session refused to adopt Lord Brougham's view; and it was then ruled that the husband's residence for forty days would not give jurisdiction in an action at his instance against the wife. From that time the forty days' jurisdiction fell into disfavour, though, we believe, it was acted upon in many unreported cases. In the case of *Jack v. Jack*, decided by the Second Division after consulting the whole Court, *domicile*, as distinguished from temporary residence, was held by the majority of the judges to be the proper ground of consistorial

jurisdiction ; but in *Pitt's case* the old notion of a 'forensic domicile' was revived in a somewhat modified form. When the case went to the House of Lords, counsel declined to support the judgment, as founded on 'forensic domicile,' but maintained that Colonel Pitt had established a real domicile in Scotland. Both views were unhesitatingly repelled by the House of Lords. As this question has already assumed something of a controversial aspect, as between the jurists of England and Scotland, we venture to add the expression of a hope that the principle now established (and which we believe to be reasonable in itself) will be carried out with reference to the decrees of the English Divorce Court. Any other course would be detrimental to the law, and disparaging to the more ancient jurisdiction of the Court of Session.

II. CONTRACT—(1.) *Master and Apprentice*.—The case of *Lyle v. Service*, 12 Nov. 1863, if it has not established any new doctrine, has at least proved that a duty, which is commonly supposed to be only binding *in foro conscientia*, may be enforced by action. In this case, the Court, on an advocacy from the Sheriff Court of Renfrewshire, held it to be proved that the respondent, a baker, had failed to give the pursuer, his apprentice, proper instructions in his trade ; that it was not enough that an apprentice should be allowed to see the work going on, but that he must be taught to do it ; and that it was not a sufficient excuse for the master to say that the apprentice was stupid and inattentive. In accordance with these views, the Court awarded L.15 of damages against the master,—a sum which seems very moderate when compared with the injury which must be presumed to have been sustained in the circumstances.

(2.) *Loan of Money*.—In the case of *M'Keen v. Kewan's Trustees*, the Court negatived an action founded on the plea that a general acknowledgment of the receipt of money imported that the money was received as a loan, under an obligation to repay it with interest. The decision was rested partly on the ground that the pursuer had failed to produce the letter by which, as he alleged, a loan was requested, and that the defenders, the trustees of the alleged borrower, were entitled to obtain from the pursuer all the evidence which was or ought to have been in his possession with regard to the contract. The decision might with propriety have been rested on broader grounds. We see no reason why an acknowledgment

of the receipt of money should be referred to the contract of loan rather than to any other contract. A party claiming the repayment of money for which a receipt has been obtained, ought to be bound to adduce evidence to support the contract for repayment. It is otherwise where property or documents of debt have been transferred without the intervention of writing. There the presumption has very properly been held to be against donation.

(3.) *Wayleave*.—The case of *Addie v. Henderson and Dimmack* is only interesting as an example of a class of questions which are becoming rare in the practice of the Court of Session; we refer to questions on the construction of contracts. In this case, the Court held that in a feu-contract for mineral property, with the joint use of a railway, a stipulation to the effect, that if any other parties should 'use the said railway, the said second parties (the vassals) and their foresaids shall be paid by such other parties a fair proportion of the expense of maintaining the said railway,' meant that the superior reserved to himself the right to confer the privilege of using the railway upon other parties, upon the condition mentioned in the contract.

(4.) *Partnership*.—It is very clear, in point of principle, that a party who sells or transfers his business to another, cannot get rid of the obligations he has already contracted by merely advertising that the new firm will receive the debts and discharge the obligations of the late concern. But in the case of *Pollock & Co. v. Murray*, 6 Nov. 1863, it was maintained that such obligations were extinguished by novation, where the creditor, acting upon the advertisement, applied to the new firm for payment, but failed to obtain it in consequence of its becoming bankrupt. The Court very properly repelled this plea, holding that, as regards creditors of the late firm, the advertisement merely constituted the new firm their mandatories for the payment of their debts.

III. INJURY.—Under this head we may notice first, a curious case of breach of promise; and secondly, some decisions bearing upon the *questio vexata* of the responsibility of masters for injuries to workmen in their own employment.

(1.) *A. v. B.*, March 9, 1864. Breach of promise of marriage was alleged in respect of a letter in which the defender, with many expressions of contrition, avowed that he no longer loved the pursuer, adding:—'If with this knowledge you would still prefer that

our engagement should not be broken off, I promise that I would enter upon the new state with the firm intention of doing my best, in the absence of love, to make your life comfortable and happy.' The Court granted an issue of damages, holding that love was part of the contract, and that the offer contained in the passage quoted was not one which the pursuer could honourably accept.

(2.) From broken hearts to broken bones is a violent transition, rendered necessary by the desultory character of our comments. The liability of masters for injury to workmen in their employment was the subject of consideration in no less than three cases which came before the Inner House in the last session. In *Devine v. Robertson & Co.*, 6 Nov. 1863, the claim was for damages for injury sustained by a blow from the carriage of a 'self-actor,' which began to move in some unexplained way. The pursuer failed to prove that the machinery was defective, or that the man by whose orders she was cleaning the machinery was foreman or other than a collaborateur; and the Court accordingly reversed the judgment of Sheriff Alison, who had found the defenders liable in fifteen guineas of damages. The question of masters' liability for the fault of their managers was more directly raised in the cases of *Morton v. The Edinburgh and Glasgow Railway Company*, 3 Feb. 1864, and *Morris v. Phillips* and *Roxburgh v. Wright*, heard together and decided 26 Feb. 1864. In the first-mentioned case, which was an action at the instance of the widow and children of an engine-driver in the employment of the defenders, who was killed at the Winchburgh accident, the ground of action was negligence in the general management of the company. It was contended by the defenders, that all the parties in their employment, from the manager downwards, were to be regarded as collaborateurs; and that a master, not being liable for injuries caused by one employee to another, no issue should be allowed. The First Division unanimously repelled this plea, and allowed an issue on the ground that the negligence alleged was in the general management.

This decision is apparently at variance with the decision pronounced by the Second Division in the other cases to which we have referred, where it was held that an underground manager of a coal-pit was to be regarded as a collaborateur with the miners who were under his orders; insomuch that, although he was personally liable in damages for gross negligence, no liability attached to the lessees of the pit. We trust that the Court of Appeal will not sanction

such an extension of the doctrine, as the result of its recognition would be to give complete indemnity to companies carrying on hazardous operations through the agency of a manager. That actions of damages of this class are frequently taken up for the sake of getting expenses, may be conceded; but this ought not to blind us to the just claims of working people, who are called upon to risk their lives at the bidding of an irresponsible agent under the pain of loss of employment, and whose only protection is the liability to which the master has been supposed to be subject for the consequences of orders given by persons holding his authority.

IV. PROPERTY.—First among decisions relating to real rights, we may class the case of *Muirhead v. The Glasgow Highland Society*, 15 Jan. 1864, in which the First Division refused to ordain a proprietor to take down a building, on the ground of its alleged interference with the servitude rights of an adjoining proprietor, who had notice of the intention to build. ‘If,’ said Lord Deas, ‘in the first place, one proprietor stands by and sees another performing, at great expense, operations at variance with a servitude right, and says nothing, that silence amounts to acquiescence, which bars him from afterwards pleading his servitude. Secondly, there is a sufficient answer to the action in the warrant of the Dean of Guild, under which the buildings on the defender’s property were erected. . . . One of the objects of the application to the Dean of Guild was to afford the Union Bank the opportunity of opposing a warrant for the proposed erections being granted; and if the Bank did not oppose the warrant, but allowed the buildings to go on, they could not interfere now.’

We cannot help thinking that the same equitable exception might have been allowed in the case of *Nisbet v. Cairns and Howden*, 11 March 1864, where the Second Division reduced a sale of property by an heritable creditor, on the ground of his omission to advertise during one of the weeks during which advertisement was required by the terms of the power of sale. The sale took place *eighteen years* before the decision; and it does not seem altogether reconcilable with equity, that a proprietor should be allowed to lie by for so lengthened a period, and afterwards to challenge a sale which was rendered necessary by his inability to meet his engagements.

In connection with the subject of property, we may notice the ‘Victoria’ lozenge case, *Wotherspoon v. Gray*, 12 Dec. 1863, where

it was held that a manufacturer has no property in a fancy name given to an article of commerce, unless the article itself is a novelty. 'Victoria,' as an adjective, it seems, is public property!

V. SUPERIOR AND VASSAL.—The case of *Hutton v. Macfarlane*, 10 Nov. 1863, is a strong illustration of the rule that a superior is entitled to reinsert a clause, reserving his own rights in the estate, which had been dropped out of a progress. Here the clause was a reservation of mines and minerals, and the clause had been omitted for more than forty years. We presume that possession had not been had by the vassal of the mineral property, otherwise prescription must be allowed to have run in favour of the vassal, by possession on his charter.

Clauses of relief from public burdens seem to have given occasion to a good deal of litigation in recent years. Two of these were decided last winter. In *Hope v. Hope*, 20 Feb. 1864, it was held that a clause of relief contained in an original charter, but which had never entered the record, must be inserted for the future. In *Paterson's Trs. v. Hunter*, 10 Dec. 1864, the more difficult question was propounded, whether the superior was liable under such a clause to any greater extent than the amount of the feu-duty. The First Division were at one in the opinion that the obligation could not be limited to an aliquot part of the whole public burdens, in the ratio of the value of the lands to that of the feu-duty; but reserved their opinion as to whether the superior was liable in excess of the feu-duty. Lord Deas intimated an opinion in favour of the superior on the latter point, in which we are disposed to concur.

VI. It is now settled that the omission of the *designation* of the name of the writer of a deed constitutes a nullity, and cannot be supplied by a condescence. Surely it is high time that something should be done to mitigate the rigour of the much over-lauded Acts by which the validity of conveyances is made to depend upon compliance with formalities which afford no security against fraud, and the omission of which is due to no fault on the part of the recipient (*Callender v. Burn*, 17 Dec. 1863).

VII. TRUSTS AND SUCCESSION.—Under this rather general category we propose to class four cases belonging to different branches of the subject. (1.) The first of these is a case on the construction

of a power now of very frequent occurrence in trust settlements, *i.e.*, a power to advance part of the capital to a liferenter. In the case in question, *Hambleton v. Hambleton's Trs.*, 25 Nov. 1863 (a First Division case), it was very properly held that such a power was entirely discretionary, and that the Court could not compel the trustees to exercise it. As in that case the fee was carried over by the destination to charitable uses, the decision must be admitted to be a hard one. Conveyancers should take care not to insert clauses giving the actual *disposal* of property to trustees as matter of style. Of course, if the truster wishes his trustees to have a power of disposal of his estate, he is entitled to give it; but the expediency of granting such powers to persons not beneficially interested is more than doubtful.

(2.) The never-ending puzzle of the vesting of beneficial interests received some further illustration in *Donaldson's Trs. v. Macdougall*, a case which has already figured too well in the Reports of the House of Lords. The final decision (15 Jan. 1864) is so lengthy and so much involved as to be unsuitable for insertion here; but the case, which has now become the leading one in this branch of the law, deserves to be studied in all its stages.

(3.) In *M'Larty v. M'Larty*, the Second Division decided that, in case of deficiency, legacies of fixed amount must be paid in full before the residuary legatee could touch the estate, however clearly it might appear that the testator meant to leave the bulk of his fortune to the residuary legatee.

(4.) The decision of the majority of the whole Court in the *Liquidators of the Western Bank v. Buchanan*, 26 Feb. 1864, is, in our humble opinion, unsound. That trustees may contract with the parties with whom they enter into partnership as bankers, to be relieved of personal liability, is as plain as that they may enter into any other contract within their powers. But to say that the mere description of them in their character as trustees amounts to such a contract, is just begging the question. The description in itself does not import anything of the kind; and to give that meaning to it, is just a roundabout way of giving the trustees indemnity *ex lege*, when no special contract has been made. The result of this decision would be, that a special contract would require to be made, to render trustees liable in the same degree as other shareholders. The decision, which was opposed by the Lord Justice-Clerk in an able

opinion, and by several of the other judges, is already reversed by the verdict of professional opinion, and in all probability will be so in the House of Lords.

VIII. POOR LAW.—*Buie v. Steven*, 5 Dec. 1863. In this case the Court very reasonably refused action to a parochial board against a defender for the aliment of his grandmother, he having previously offered to relieve them by entertaining her at his house. Their Lordships waived consideration of the question, whether the grandmother might have had a claim for separate maintenance in an action at her own instance. But they were clearly of opinion that a parochial board had no title to try such a question, in consequence of having given aliment to the pauper,—their statutory duties being confined to the affording of ‘needful sustentation,’ and which was not descriptive of the relief given in this case, in opposition to the wishes of the party who was bound and was willing to furnish aliment.—*Isdale v. Jack*, 31 March 1864. In this case the whole Court, by a majority of one, decided that a parochial board is not entitled to give relief to the able-bodied. (See the report in our present impression.)

IX. STATUTE.—Under this head we had noted the case of *Young v. Lang*, 18 Feb. 1863, a case under the local Smoke Prevention Act, 7 & 8 Geo. IV., c. 43; but apparently there is ‘nothing in it.’ *Ex fumo dare lucem* doesn’t apply. The respondent, however, was ordained to have his furnaces altered so as to be in conformity with the most approved model of construction.

X. ACTIONS AND DILIGENCE.—This article has already extended beyond our usual limits, and we do not think that cases under this department of our classification are sufficiently interesting to detain us further. We may note, however, two cases in which the Court had to consider the equitable defence of retention. In *Blaikie’s Tr. v. The Scottish Widows’ Fund Assurance Society*, 4 Feb. 1864, a majority of the whole judges qualified to vote held that an assurance society is entitled, in competition with the trustee for the creditors of the assured, to retain policies of assurance effected with them in security of money advanced, and that although the condition on which the sum assured was payable had not yet emerged. The other case, *Ferguson, Russel, & Co. v. The Scottish Central Railway*

Co., 27 Feb. 1864, related to the lien claimed by railway companies for arrears of carriage over goods sent to them for carriage. The decision of the First Division of the Court was, that there was no such lien,—a result which we consider satisfactory both on legal and economical grounds. An opposite decision would have led to much confusion, and would probably have called for legislative amendment.

New Books.

A Treatise on the Law of Evidence in Scotland. By WILLIAM GILLESPIE DICKSON, Procureur and Advocate-General of the Mauritius. Second Edition. Edited by JOHN SKELTON, Advocate. Edinburgh: Bell and Bradfute.

ANYTHING like a formal criticism of a work so well known and so highly valued as Mr Dickson's *Treatise on the Law of Evidence*, would be a work of supererogation. Yet we willingly seize the opportunity afforded by the appearance of the second edition of this important work, to express our sense of its great value, both as a contribution to the jurisprudence of Scotland and as a guide to the practitioner. The subject is a large one—probably the most extensive in its scope, and involving the greatest amount of labour and research, among the special treatises on our law which have yet appeared. In one aspect, a treatise on evidence is a treatise on the entire municipal law of the country, considered with reference to the mode of proving the facts which constitute the ground of action in the various descriptions of legal rights. For example, the subject of written evidence at once opens to our view, first, the practice of conveyancing in one of its most important departments; secondly, the subject of mercantile contracts, in so far as constituted by writing, formal or informal; thirdly, the legal import and effect of correspondence and informal writings, and the rules according to which validity may be given to such writings by implement of the contract by the other party. The subject of juratory evidence is one which enters more or less deeply into all departments of the law of property; for there is scarcely any description of claim affecting property, in regard to which the lawyer may not have occasion to consider whether he is entitled to insist on a proof at large, or to be restricted to writ or oath. In connection with the department of parole evidence, the subject

admits of more general discussion, though even in this branch of the subject the great landmarks of the law require to be kept in view. The constantly recurring question, how far parole evidence is available to prove a particular fact, renders necessary a mode of treatment under which the most important topics of general law must be passed in review.

Mr Dickson, as is well known, brought to bear upon the subject of his choice an untiring patience, and a mind thoroughly trained to the investigation of legal questions, and well qualified to deal with them in all their bearings. His work evinces at once a minute and practical acquaintance with the case law of the country, such as could only have been acquired by years of conscientious application to its study, and also a mastery of the principles and modes of investigation of questions of evidence, which entitles him to a high place among our jurists, and will secure for his work a permanent station in the law literature of Scotland.

In consequence of Mr Dickson's appointment to the office of Advocate-General in the Mauritius, which he has held for many years with much acceptance, he has been prevented from personally revising the second edition of his *Treatise on Evidence*; and the work of revision has been accordingly entrusted to Mr Skelton, assisted, as we are informed in the preface, by Mr Gloag. The editorial department could not have been placed in better hands. Mr Skelton, although more known as a contributor to general literature than as a legist, has in this work given most satisfactory proof of his capacity for dealing with law as the subject of systematic exposition. His notes—and we presume we are right in including Mr Gloag as a joint-contributor to this part of the undertaking—give evidence of the same habits of laborious investigation, and of the same capacity for generalizing the results of the decided law, which characterizes the text of Mr Dickson's *Treatise*. Of course, the duty of the editor of a second edition of such a book must be light in comparison with that of the author; but such as it is, we are satisfied that it has been most thoroughly and ably performed.

A Handbook of Bankers' Law. By HENRY ROBERTSON, Notary Public, Bank of Scotland. Second Edition. Edinburgh: Bell and Bradfute.

MR ROBERTSON'S *Manual of Bankers' Law* was favourably reviewed by ourselves on its first appearance; and we are glad to find that

the success which we anticipated for it has been realized by the appearance of a second edition within a time which, with reference to a law book, may be called brief. Mr Robertson's work deals with a branch of law specially interesting to bankers and merchants, who, we believe, often know more about the law of their own departments than professed lawyers do. Although claiming to be written chiefly for the benefit of that class, we have no hesitation in saying that the *Handbook of Bankers' Law* will be found to be very useful to legal practitioners generally. Not only does it contain an excellent digest of the statute and case law of the subject, brought down to the latest date; but there will be found in it a great variety of information connected with the practice of banking, and the transactions with which bankers are conversant, which is not to be had in the regular legal treatises, but which the practitioner would do well to peruse before offering advice on this important and intricate department of mercantile law.

Correspondence.

THE SHERIFF COURTS.

To the Editor of the Journal of Jurisprudence.

SIR,—Perhaps, after recent occurrences, anything I can write may seem tame and uninteresting; but at the risk of over-taxing your courtesy, I again request permission to address you. What induces me to do so, is not that I desire discussion with your contributor, or think that much weight is due to his observations, but that, in addressing you, I address at the same time a large and intelligent body of readers.

With much of the contents of your articles I have at present no concern. I believe a reconstruction of the appellate jurisdiction in the Sheriff Courts to be unavoidable, sooner or later, and at some other time I shall be willing enough to discuss that subject. At present the issues raised are simpler, and I shall pass to their discussion, with no remark upon the other question, save this, that the institution of non-resident Sheriff must surely be in a perilous way if your contributor's energetic defence was requisite. I intend in this letter, then, to confine myself to the questions of the salary of the Sheriffs-substitute, and of their exclusion from promotion, and to notice your articles only in so far as they bear either directly or indirectly upon these.

Upon the question of salary, I believe I interpret your contributor's views fairly when I say, that he holds that it is comparatively immaterial how the judge of the first instance is paid, because, if that judge be inefficient, he can at once be put right by the judge of appeal. Your contributor seems

to think that it is unnecessary to give the resident judge of a Scottish county more than one-third or one-half of what is given to the resident judge of an English county, because, if the Scottish judge err, there is an easy means of putting matters right. I dispute both the soundness of this doctrine and its application. It is unsound; for, to carry it out to its legitimate consequences, it would involve such propositions as these—that it was of comparatively little consequence how the judges of the Outer House were paid, because their errors could be corrected by the Inner House; and that the Inner House judges, again, need not be well paid, because they happen to be under the supervision and control of the House of Lords. And the doctrine has no application, because in three-fourths of all the work that a Sheriff-substitute does, the Sheriff has no power to keep him from falling into errors, or to correct his errors when made. It is of no consequence to say, that the cases in which the review of the Sheriff is excluded are, taken one by one, of little consequence. They are generally of as much consequence to the individuals concerned, as more weighty matters are to men of higher station; and when they are taken collectively, it becomes of far more consequence to the mass of the inhabitants of a county that the Small Debt and Summary Criminal Courts, from which there is no appeal, should be well managed, than the ordinary Sheriff Court. Your contributor's theory,—that out of a given sum—say £1500 a-year—to be expended in securing judicial service, it is better to apply one-half to obtain the services of a judge to commit errors, and the remainder to secure those of another judge to correct them,—as applied to the Sheriff Courts, means this, that the interests of the majority, who compose the lower class of litigants, are to be sacrificed, in order that a cheap means of appeal may be secured to the minority composing the higher class of litigants, who could generally afford easily to use the more expensive right of appeal to the Supreme Courts.

The most important point for consideration on the question of salary, is, what income will induce competent men to undertake the office, and enable them, when appointed, suitably to maintain the status of chief resident judge and magistrate? On these points it would be sufficient to show the inadequacy of the present scale, were I arguing merely with your contributor, to quote his assertion, that it secured for the office none but men who had failed in their profession. This, however, is plainly an exaggeration; and for my own part, I remember that when I was appointed, you were kind enough to speak of me in language of a somewhat more complimentary description. The question of salary is a question of comparisons; for if men of ability can obtain higher remuneration in other branches of our profession or in other professions, they will not become county judges. You select for comparison with us the incomes of the professors and of the clergy. The comparison in both instances is unfair. If any one will secure to the Sheriff-substitutes a six months' vacation such as the professors have, to employ as they please, nothing more will be said. The case of the clergy is peculiar. As the *Saturday Review*, speaking of the 'marked value of ability,' says:—

'We must first put aside all professions to enter on which is to make a voluntary and conscious self-sacrifice. No one, for example, can venture to say that he looks upon taking orders as a good pecuniary investment. The life of a clergyman is ordinarily a life of poverty—of decent poverty

perhaps, and of a poverty gilded by the respect of society, but still of poverty. A living of L.500 a-year is thought a very fair piece of preferment, and, after outgoings are paid, a living of L.500 a-year brings in very little more than L.300. This is not very tempting; and although it is quite true that there are many prizes in the Church, and that a sprinkling of the minor order of these prizes is wisely allotted to honest plodding merit accompanied by decent ability, yet the prospect is not so attractive as might be expected, for these rewards of ecclesiastical merit ordinarily come late in life, and are not much of a worldly recompense for years of poverty and struggling.'

Admitting the force of all this, I should still say that the incomes of the clergy should be quoted rather as warnings than as examples. Complaints are numerous that the middle classes do not educate their sons for the Church, and that the status of the clergy consequently suffers. The difficulty in the way of raising their incomes is their number. There may be half a dozen of them in one parish, though there is generally but one resident judge in a county. In the county where I have the honour to hold office, there are more than twenty clergymen of the Established Church, and more than twenty of other denominations. Does your contributor seriously maintain that Government or society should deal with all these incomes on the same scale?

The comparison of our incomes ought in the first place to be with those of other judges. You might, for example, compare our incomes with those of the Sheriffs. We are generally on equal terms as regards education; and yet the Sheriff receives, for doing perhaps a tenth part of the work that we do, with full liberty to turn the remainder of his time to the best account he can, more than we receive for the surrender of our whole time. You might compare us with the English county judges, who receive more than twice our average income for exercising a more limited jurisdiction; or you might make a more humble comparison, and compare our remuneration with those of county agents, bankers, or factors; and then, if I mistake not, you will invariably find that the incomes of successful men of business exceed those of the judges in amount, and are of a hardly less permanent nature. It is almost needless for me to add, that our incomes fall greatly short of those which professional men of sufficiently moderate accomplishments can earn in the larger towns. You compare our incomes with those of the worst remunerated men in the kingdom—the men who devote themselves to religion, to science, or to literature: I think I have now furnished you with the means for a fairer comparison.

I have almost finished what I have to say on the question of salary. You seem willing to support our claims to some small extent, and not indisposed to raise the incomes of the resident Sheriffs in one or two of the larger counties. I maintain that the smaller counties are also entitled to consideration. The principle of payment according to work does not apply with any exactness to cases where you take the whole of each man's time whether you employ him or not. If you were to apply that principle, it would lead to the adoption of such a scale in the smaller counties that a man of ability would scarcely take the office. If you reply that it is absurd to pay a man more than L.500 a-year for trying some dozen of summary criminal cases in the year, I answer that it is absurd to have such an official at all. Where there is not a fair amount at least of

work, there is in general no necessity for a resident judge; and there would, I think, be no difficulty in striking off ten or twelve at least of the fifty-five substituteships at present in existence.

I have but one word to say on the question of promotion. If you are right in your proposition that it is contrary to the nature of things that a Sheriff-substitute should ever receive professional advancement, you are certainly wrong as to the question of salary. But you mistake the whole question of promotion. You put it as if we were complaining of personal injustice. For my part I make no such complaint; and the only consideration which I take to be of the smallest importance, is this, whether it is for the public interest that any class of officials should be made to understand that, however diligent and successful they may be in discharging their duties, whatever services they may render beyond these, they are to expect from the public no reward beyond that attached to routine performance.

I now conclude. Your contributor's object seems to have been to show that the maintenance of the present system of having non-resident and resident Sheriffs is synonymous with scant remuneration and no promotion to the latter. My object has been, on the other hand, to show that the present claims of the Sheriffs-substitute have no necessary connection with the question of the maintenance or abolition of the office of Sheriff. —I am, etc.,

A SHERIFF-SUBSTITUTE.

ORDER OF LEADING PROOF.

To the Editor of the Journal of Jurisprudence.

SIR,—In a recent case (12th Feb., *Scrimgeour v. Stewart*) the Second Division of the Court of Session, in reversing the decision of the Lord Ordinary, and reverting to that of the Sheriffs of Perthshire, were pleased to animadvert on the terms of the interlocutor of the latter, in sending the case to probation.

The action was one of filiation and aliment of an illegitimate child. The defender denied sexual intercourse with the pursuer; and, as is now almost the uniform procedure in this class of cases, in counter statements the defender averred intercourse with another man named in the record. The Sheriff 'allowed the pursuer a proof of her averments, and to the defender a conjunct proof.' The Court were of opinion that the correct form was to 'allow *both* parties a proof of their averments, and to the *pursuer* a conjunct probation.'

This is a position which admits of some doubt. A charges B as putative father of her child; *that* and *that only* is the issue and subject of a proof in chief. The defender denies intercourse with the pursuer, and alleges that she had intercourse with C. This defence raises no *separate* issue, but is merely to meet the charge of the pursuer, and therefore is only conjunct to the pursuer's proof in chief. The only result can be to fix the child on B, or to relieve him of the charge. No judgment can be given against C, who is not called nor heard for his interest: therefore there can be no *direct* issue or proof in chief as between A and C; and no party could lead a proof properly conjunct to that of B as against C, but C himself, who is not in court.

The *order* of leading evidence is quite separate from the *burden* of

proof. In the case supposed, A can at one diet lead evidence both to affirm her libel and negative the defence; and the proof of B is conjunct to both. Unless on the ground of surprise, such as in the Jury Court would warrant a new trial, the pursuer is not entitled to go back on her proof. The form suggested by the judges of the Second Division is open to this obvious objection, that the pursuer is allowed a proof in chief, to which the *defender is allowed no proof conjunct thereto*. In that form the issue as put between A and B admits only a proof in chief by A, without any counter proof by B; but in the correlative or subordinate issues as between A and C, the defender B is made to stand as pursuer, and A as defender, with a conjunct proof. Thus the real issue resolves into a proof *ex parte*; whilst the secondary issue, which can terminate in no judgment between A and C, is made the leading issue, requiring a proof in chief as well as one conjunct, which latter is denied in the principal or only real issue in the action.

There are several analogous cases which may illustrate the rule. A charges B with assault, and sues for damages. B denies he struck the blow, and avers that it was one C who did so. The simple issue would be as between A and B; and the proof as against C would only be collateral or conjunct, and could never authorize a decree against C.

In like manner, A sues B for a debt. B, in defence, denies he contracted or is liable for the debt, but one C. The issue in such a case would be direct as between A and B; and the allegation as to C would be only admitted as conjunct proof.

There may be no great principle involved in the form of the interlocutor, if substantial justice be ultimately done. But the form recommended by the Supreme Court is open to this objection, that an issue is directly raised as against a party who is not in the process or heard for his interest. If there should be any alteration in form, the more artistic amendment would in such a case be to allow proofs to both parties of their respective averments, and conjunct proofs.

LEX LEGIS.

[We think the difficulty which has suggested itself to the mind of our esteemed correspondent, may be got over by attending to a consideration mentioned by himself, which is that the interlocutor in question determines nothing but the 'order of leading evidence.' In a previous case, in which the form of interlocutors allowing proof was the subject of discussion in the Second Division, it was explained that the defender's proof, in so far as 'conjunct' to the pursuer's, ought to be adduced along with his proof in chief; and therefore that there was no occasion for allowing a conjunct proof to the defender as distinct from his proof in chief. The pursuer, on the contrary, is obliged to close his proof in chief before he has had an opportunity of learning the evidence to be adduced by the defender. Hence the necessity for an allowance of proof in replication to the pursuer, which is all that is meant by a 'conjunct proof' in the sense in which that expression is now used in the Court of Session.—ED. J. J.]

BILLS BEFORE PARLIAMENT.

THE SUMMARY PROCEDURE BILL.

THE object of this Bill, as its title indicates, is the establishment of a uniform code of procedure for the summary prosecution of offences, and the enforcement of penalty clauses in Acts of Parliament. If we contrast the large number of Acts passed every year, the observance of which is sought to be enforced by penalty clauses, with the very limited number of prosecutions for penalties in our inferior courts, we must conclude either that the population of this country have shown a singular alacrity in giving obedience to laws which few of them have the means of reading, or that the laws in question are very indifferently enforced. We believe the latter conclusion would be found to furnish the true explanation of the disproportion referred to. To the further inquiry, Why the observance of laws intended for the protection of persons and property, and the enforcement of social order, are left to the conscience of those interested in contravening them? the answer must be that the Legislature is chiefly responsible, it having neglected to provide the requisite machinery for enforcing its mandates. The greater number of statutes creating petty offences and imposing penalties, extend to the whole United Kingdom; but the forms of procedure enjoined in them are such as are adapted to legal proceedings in England and Ireland, where the writs in use are different from those which the Scotch law recognises, and where the parties entitled to prosecute are necessarily different. When we add to this the consideration that Procurators-fiscal and other official prosecutors are liable in heavy damages, not only for their own mistakes, but also for the blunders of the judges and clerks of court, before whom prosecutions are instituted, it is not surprising that they should seek, as far as possible, to avoid undertaking duties of such an undefined and hazardous character.

It is very obvious, that the enactment of a simple and intelligible code of summary procedure would greatly facilitate the conduct of public prosecutions in the inferior courts; and we understand that the main provisions of the Bill of this session have already obtained the approval of many of the most experienced judges and practitioners in this branch of administrative jurisprudence. The Lord Advocate has obtained an order to reprint the Bill with amendments; but as we understand that the amendments consist chiefly of some additional clauses, establishing a cheap system of appeal, and as the amended Bill will not be in the hands of the public before we go to press, we, in the meantime, append an abstract of the Bill in its original form, and hope in our next number to be able to give some account of the amendments which are now in contemplation.

A Bill to make Provision for Uniformity of Process in Summary Criminal Prosecutions, and Prosecutions for Penalties in the Inferior Courts in Scotland.

[The preamble recites the Acts 9 Geo. IV. c. 29, 11 Geo. IV. & 1 Will. IV. c. 37, and 19 & 20 Vict. c. 48, and proceeds as follows:—]—And whereas it is expedient to make further and more effectual provision for the trial of offences punishable on summary conviction, and for the summary recovery of penalties in the Inferior Courts in Scotland: Be it enacted, etc.

1. [Short title.]

2. [Interpretation of terms.]

3. The provisions of this Act shall be applicable to—(1) All proceedings before any sheriff, justice, or magistrate in Scotland, in virtue of the summary jurisdiction conferred upon them, or any of them, by the recited Acts, or any of them: (2) All proceedings to be taken before any sheriff, justice, or magistrate in Scotland, for the prosecution of any person who has committed, or is charged with having committed, any offence or act for which, under the provisions of any Act of Parliament, he is liable, upon summary conviction before any sheriff, magistrate, or justice, to be imprisoned or fined, or otherwise

punished, or to be ordered to do or perform any act, and to be imprisoned in default of performance: (3) All proceedings for the recovery of any penalty, or sum of money in the nature of a penalty, which, under the provisions of any Act of Parliament, may be recovered by summary complaint or information, or by poinding or distress and sale, or other summary process or diligence of the like nature, before any sheriff, justice, or magistrate: (4) All proceedings for the trial or prosecution for any offence or for the recovery of any penalty, under any Act of Parliament, by which it shall be provided that offences committed in contravention thereof, or penalties thereby imposed, shall be prosecuted or recovered under the provisions of this Act.

4. All proceedings for summary conviction for any offence, whether at common law or under any Act of Parliament, and all proceedings for the recovery of any penalty which may be sued for or recovered in a summary form, whether such proceedings are at the instance of a public or private prosecutor or complainant, may be instituted by way of complaint in one or other of the forms set forth in the schedule (A.) to this Act annexed; and in cases in which there are more than one Act of Parliament having relation to the same offence or class of offences, it shall be sufficient in such complaint to cite the latest Act, and to refer to the Acts therein recited; and no objection shall be allowed by the Court to any such complaint for any alleged defect therein in substance or in form, or for any variance between any such complaint and the evidence adduced on the part of the prosecutor or complainant at the hearing thereof; but if any such objection or variance shall appear to the Court to be such that the respondent has been thereby deceived or misled, it shall be lawful for the Court to adjourn the hearing to some future day, and at the same time to direct such amendment to be made upon the complaint as may appear to be requisite; and such amendment shall be authenticated by the signature or initials of the judge or clerk of Court; and where it is necessary, in virtue of any statutory provision, that any such complaint should be supported by the oath of the complainant, or of a credible witness, such oath may be in the form of the schedule (B.) to this Act annexed.

5. On such complaint being laid before the Court, it shall be lawful for the Court to grant warrant to cite the respondent personally, or by leaving a copy of the complaint, with the warrant of citation annexed, at his last or usual dwelling place, in common form, to appear before the Court on inducias of not less than *forty-eight* hours; or (where apprehension is competent) to grant a warrant for the apprehension and interim detention of the respondent: provided that where the complaint shall pray for a warrant of apprehension, the Court may in its discretion grant, in place of such warrant, a warrant for the citation of the respondent as aforesaid; and it shall be lawful to annex to such warrant of citation or apprehension a warrant to cite witnesses and havers for both parties, and also (where such procedure is otherwise competent) a warrant to search for and seize stolen goods or other articles mentioned in the complaint.

6. [Court may proceed in absence of respondent in certain cases, or issue a warrant for his apprehension.]

7. [Execution of warrants of apprehension and citation.]

8. [Execution of warrants beyond the jurisdiction of the Court. Provisions of 11 & 12 Vict. c. 42, made applicable to warrants granted by magistrates of boroughs, and to all warrants issued under this Act.]

9. [Apprehension of witnesses. Warrant may be granted in the first instance, if Court satisfied by evidence on oath that it is probable witness will not attend without being compelled.]

10. Any respondent brought before the Court by a warrant of apprehension under the authority of this Act, or appearing voluntarily, shall be entitled to require a copy of the complaint, and also to require that the hearing shall be adjourned for a period not less than *forty-eight* hours after the delivery of such copy; and such requisitions shall be complied with if made before the examination of any witness on the merits shall have commenced; but no such requi-

sition shall be competent where a copy of the complaint shall have been delivered to the respondent *forty-eight* hours before the hearing.

11. Subject to the provisions contained in the preceding section, no adjournment of the hearing shall take place when the respondent pleads not guilty, or at any other stage of the proceedings, unless the Court shall, in respect the respondent has not had time to prepare for his defence, or for some other sufficient reason, think fit to order an adjournment: Provided, that where such adjournment is made it shall be lawful for the Court to grant warrant to detain the respondent until the period to which the hearing shall be adjourned, or until he finds sufficient caution to appear at all future diets of the Court.

12. Any sheriff, magistrate, or justice, though out of his county or jurisdiction, may sign any conviction, judgment, warrant, or interlocutor under this Act; provided the evidence and every other proceeding necessary to support such conviction, judgment, warrant, or interlocutor shall have been had before him when within his county or jurisdiction.

13. [As to judgment of absolutor by default and abandonment of the complaint. Absolutor in a prosecution for the public interest may be pleaded in bar of any subsequent prosecution.]

14. Where the respondent shall be present at the hearing, the substance of the complaint shall be read or stated to him, and he shall thereupon be required to plead in common form; and the respondent may then state objections to the competency or relevancy of the complaint or proceedings; and if no objections are stated, or if such objections are stated and repelled, or are obviated by amendment of the complaint or adjournment of the diet as hereinbefore provided, the respondent's plea shall then or at such adjourned diet be recorded, and the plea shall be signed by the respondent, or by a judge or the clerk of Court if the respondent cannot write; and the prosecutor or complainer shall thereupon proceed to establish his complaint by legal evidence or by such evidence as is required by the Act of Parliament founded on, and the respondent may afterwards lead such evidence as is competent, and the prosecutor may, with permission of the Court, lead evidence in replication; and before judgment is pronounced each party shall, subject to the control of the Court, have liberty to address the Court upon the evidence; and the Court may, where the complaint concludes for a pecuniary penalty only in the first instance, or where the Act authorizes such procedure, dispense with the personal attendance of the respondent, and allow him to appear and plead by a procurator of Court.

15. Where the Court shall proceed to dispose of the complaint in absence of the respondent, judgment shall not be pronounced against him until the complaint has been established to the satisfaction of the Court by legal evidence, or by such evidence as is requisite under the Act of Parliament founded upon.

16. It shall not be necessary in any proceeding under the authority of this Act to record the evidence adduced, but the record shall set forth in the form of the schedule (I.) to this Act annexed the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, and the conviction or judgment; and shall also, if either party desire it, set forth in the form of a note, to be subscribed or initialed by the judge (or in a separate case, if otherwise competent), any offer of proof made by either of the parties and refused to be admitted, any objections to the admissibility of evidence sustained or repelled, and any objections to the relevancy or competency of the charge or proceedings whether sustained or repelled; and the Court may require from the party or his agent a suggestion in writing of the matter which he desires to have set forth in such note, but shall not be bound to set forth the same in the words suggested, and shall not be bound to note any objections which, in the opinion of the Court, are manifestly frivolous and untenable; and no judgment pronounced under the authority of this Act shall be challenged in any process of appeal, suspension, advocacy, reduction, or other process of review, upon any objection or ground of appeal which might lawfully have been noted

as aforesaid, unless, before judgment is signed, the party challenging such judgment as aforesaid shall have desired the Court to note the same.

17. The several forms of proceeding prescribed by this Act may be either in writing or printed, or may be partly written and partly printed; and all such forms as bear reference to any antecedent form may be either on the same sheet of paper therewith, or on a separate sheet attached to it.

18. [Is divided into eight paragraphs, having reference to the several forms of convictions and warrants contained in the schedule. It defines the class of cases to which these forms are respectively to apply. This clause is purely technical.]

19. In cases in which a statutory penalty is or shall be recoverable by pointing or distress and sale, arrestment, or other summary process of execution, and in which the respondent is also liable to be imprisoned for a term to be specified in the warrant of imprisonment, either immediately or in default of recovery of the penalty by execution, the Court, in lieu of granting warrant for recovery by pointing and sale, may issue a warrant for the immediate imprisonment of the respondent for any term not exceeding the term specified in the Act of Parliament, in one or other of the forms appended to Nos. 4, 5, and 6 in schedule (K.), but that only for one or other of the causes specified in the said schedule, the cause of granting in all such cases being specified in the warrant.¹ Provided, that no sale shall be made in virtue of a warrant granted under the authority of this Act, unless the goods are, at the appraised value, sufficient to satisfy the sums mentioned in the judgment, and the expenses of the pointing and sale.

20. [Warrants and other proceedings subsequent to conviction to be in the form scheduled.]

21. In cases in which under any Act of Parliament any matter or proceeding which may be dealt with under the forms prescribed by this Act, or which is incidental thereto, is or shall be cognizable by two or more justices, it shall be sufficient that any warrant or proceeding to which the subscription of such justices is requisite, other than the conviction or judgment, shall be subscribed by one justice; and it shall not be necessary that such justice shall have been present at the hearing of the complaint; and the conviction or judgment shall in all cases be signed by such number of justices present at the hearing and concurring in the result thereof, as may be required by such Act; and in case of an equal division of opinion among the justices present, the complaint shall be held to be not proved, and judgment shall be given for the respondent.

22. [Penalties recovered may be paid over to clerk of Court or keeper of prison, who shall account to the Procurator-fiscal or other person entitled to receive the money.]

23. In all cases of complaint under this Act for the forfeiture of any statutory penalty, it shall be lawful for the Court to make an award of expenses without the same being prayed for in such complaint; but expenses shall not be awarded to or against any public prosecutor or party prosecuting under the authority of any Act of Parliament for the public interest, unless such award of expenses is authorized by such Act: Provided, that in all cases where a complaint for the forfeiture of a statutory penalty is at the instance of a private complainant, it shall be lawful for the Court before which such complaint is brought, and any Court before which any judgment on such complaint is afterwards brought by way of review or appeal, to award expenses to the successful party if the Court shall think fit; and such expenses may be recovered and imprisonment awarded in default of payment or recovery thereof, in the manner and form specified in the said schedule (K.), in connection with the several forms of convictions and

¹ The schedule authorizes the substitution of a warrant of imprisonment for one of pointing and sale, in case it shall be made to appear at the hearing of the cause that no sufficient pointing and sale can be made, or that the issuing of a warrant of pointing and sale would be ruinous to the respondent or his family. Similar provisions are made with respect to the substitution of imprisonment for arrestment and pointing.

judgments therein contained, or if necessary, by a separate judgment for expenses in such form as may be appropriate.

24. [Warrant of imprisonment may be framed so as to take effect from the expiration of a previous sentence.]

25. In all cases in which no time is already, or shall be hereafter specially limited for instituting any complaint for the recovery or forfeiture of any penalty or sum of money, or for conviction for any statutory offence, punishable on summary conviction, in the Act of Parliament relating to each particular case, such complaint shall be instituted within *six months* from the time when the matter of such complaint arose.

26. Nothing in this Act shall extend, or be construed to extend, to any warrant or order for the removal of any poor person who is or shall become chargeable to any parish or district, nor to any information or complaint or other proceeding under or by virtue of any of the statutes relating to her Majesty's revenue, or under or by virtue of any statutory provision for the recovery of any rate, tax, or impost whatsoever.

27. In cases in which, under the authority of any Act of Parliament, any conviction may be obtained, or any warrant *ad factum præstandum* or judgment granted or pronounced, or any penalty or forfeiture or expenses recovered, by way of summary complaint before any sheriff, justice, or magistrate, and it is also provided therein, or in any other Act of Parliament having reference thereto, that such conviction or warrant may be obtained, or judgment pronounced, or penalty or expenses recovered, in any Police Court in Scotland, the proceedings by this Act authorized may be taken in such Police Court with such and the like remedies by poinding and sale, imprisonment, or otherwise, as are herein provided in the case of convictions and judgments obtained before sheriffs, magistrates, and justices of the peace; and the several forms contained in the schedules to this Act annexed may be varied so far as may be necessary to render them applicable to such Police Courts.

28. [Jurisdiction of Inferior Courts not to be extended.]

29. And whereas much inconvenience has resulted from the uncertainty which exists as to the nature of the jurisdiction conferred by various Acts of Parliament authorizing convictions for offences, and the recovery of penalties, and the enforcement of orders by imprisonment, upon summary complaint before sheriffs, justices, and magistrates in Scotland; and it is expedient to define the cases in which such jurisdiction shall be held to be of a criminal nature: In all proceedings by way of complaint instituted in Scotland, in virtue of any such statutory provisions as are herein-before mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature, where, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required, or shall be authorized, in their discretion, or in a certain event, to pronounce sentence of imprisonment against the respondent; or shall be authorized or required, in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint, under the authority of any Act of Parliament, the jurisdiction shall be held to be civil, and no suspension or advocacy of such last-mentioned proceedings shall be competent before the High Court of Justiciary in Scotland.

30. Any prosecutor or complainer in any complaint or proceedings under the authority of this Act, shall be a competent witness to support such complaint, and may also competently be adduced as a witness for the respondent; and every respondent in any such proceeding as is herein-before declared to be of a civil nature in respect of jurisdiction, may lawfully be examined as a witness for either party; and, except as herein provided, no respondent in any proceeding under this Act shall be competent or compellable to give evidence.

31. In cases in which by any Act of Parliament the provisions of an Act

passed in the eleventh and twelfth year of the reign of her present Majesty, intituled 'An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales, with respect to Summary Convictions and Orders,' are or shall be made applicable to complaints or informations under any such Act, the provisions of the said Act of the eleventh and twelfth year of her Majesty's reign shall not be applicable to any proceedings under such Act when instituted in Scotland; but the provisions of this Act shall be applicable to all such proceedings as may, under the authority of any such Act, be instituted before any sheriff, justice, or magistrate in Scotland.

32. The proceedings in any action or complaint for the prosecution for offences or recovery of penalties under any Act of Parliament may either be according to the form prescribed by such Act or any Act incorporated therewith, or according to the form prescribed by this Act.

33. [Court of Session to provide for execution of Act.]

[Here follow the schedules.]

The Bill, having been committed *pro forma*, has this day (28th April) been reprinted, with the amendments proposed by the Government. These consist chiefly of ten new clauses, giving an appeal upon a stated case to the Court of Justiciary in Edinburgh or on Circuit, in cases defined (by sec. 39) to be of a criminal nature; and, in other cases, to the Court of Session in one of its divisions. Where review is restricted or excluded by the special Act, such restriction or exclusion is to apply to appeals in the new form, unless the Sheriff or other judge should think proper *ex proprio motu* to lay a case before the judges, and to direct the prosecutor's expenses to be paid. In case of wilful refusal to state a case, where appeal is competent, the party aggrieved may apply by note to one of the heads of the Court, who may direct a case to be stated, or refuse the application. Appeal is not to be competent where the penalty is within the amount of the small debt jurisdiction, and imprisonment has not followed.

Two other clauses have been added: the one defining the extent of punishment that may be awarded under the power conferred by the General Police Act (which, by an oversight, contains no provision on the subject); the other, restricting the amount of damages which may be recovered from public prosecutors to L.20, unless the judge shall certify malice and want of probable cause, and enabling the defender, on repayment of the penalty, with L.20 as compensation for the injury, to have the action dismissed.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

SCRABSTER HARBOUR TRUSTEES *v.* SINCLAIR.—*Mar. 19.*

Property—Parliamentary Title.

This is an action of removing against Mr Sinclair of Forss in Caithness, concluding for decree of removing against him from part of the sea-shore at Scrabster, on which the harbour trustees have erected their works, and of which he has taken possession. To-day the Court dismissed the action, on the ground that an Act of Parliament giving power to construct a harbour gives no right of property in the *solum* of the sea-shore.

WEDDERBURN *v.* PATERSON.—*Mar. 21.*

Fishing—Medium Filum of Stream.

This is an action of declarator and interdict at the instance of F. L. Scrymgeour Wedderburn, Esq. of Wedderburn and Birkhill, against George Paterson, Esq. of Castle Huntly. The pursuer and defender are opposite proprietors upon the Tay where the tide ebbs and flows. Both have Crown charters giving them right to salmon fishing in the Tay, *ex adverso* of their lands. The defender's title gives him the right of salmon fishing with power to extend nets into the middle of the stream, and to prohibit all others from fishing within the said boundaries. The pursuer's title gives him the right of salmon fishing on the Tay within the boundaries of his lands. Within the last thirty years or thereabouts a bank called the Channel Bank has arisen in the middle of the Tay within the limits of the fishings of the pursuer and defender. A report by Mr Leslie, the civil engineer, shows that this bank divides the channel and body of water in the river into two nearly equal parts, there being a rather greater volume of water on the north side. The evidence of Mr Stevenson, the civil engineer, on the other hand, was rather to the effect that more water passed through the south channel, and that the north was of the character of a 'tidal gut.' Each party claimed the exclusive right of fishing in the channel adjacent to his own lands, and also a joint right of fishing in the remote channel.

The Lord Ordinary (Barcable) held, on a consideration of the scientific and other evidence, that although the south channel was on the whole the more important of the two, yet there was, in respect of depth, width, sectional area, and velocity, such an approach to equality as prevented the north channel from being considered as merely a subordinate stream, and the other the main channel, as had been contended for the defenders. His Lordship further held, that the fresh water in both channels must be looked upon as forming together the current of the river, and that the middle line, to which the parties were both entitled to fish, was that which

was equi-distant from the north margin of the fresh-water course in the north channel, and the south margin of the fresh-water course in the south channel.

The result of this decision was to give to the pursuer the whole fishing of the south channel, and to the defender the whole fishing of the north channel. The judgment was qualified by making it refer merely to the existing state of the river, his Lordship stating in his note, that if the upper end of the north channel should become entirely closed up, so as to convert it into a mere 'tidal gut,' the grounds of the judgment would cease. No expenses were found due, because the Lord Ordinary had not sustained the contention of either party, and because he thought it not unreasonable that either party should have required a judicial judgment of their rights in the altered state of the river, in regard to which there was no obvious or well-understood rule of law.

Both parties reclaimed; but soon after the reclaiming notes were presented, the pursuer proposed to the defender to acquiesce in the Lord Ordinary's judgment, which he declined to do.

To-day the Court unanimously adhered to the Lord Ordinary's judgment, holding that in the circumstances it was the most equitable which could be pronounced; their Lordships distinctly stating, however, that their judgment merely applied to the existing state of the river, it being open to either party to apply again to the Court if a change in the state of the channels should take place. The defender was found liable in expenses from the date of the Lord Ordinary's interlocutor, he having declined the pursuer's proposal to acquiesce in it.

DEWAR AND OTHERS *v.* SKINNER AND OTHERS.—*Mar.* 23.

Legacy—Special or General.

By trust disposition and settlement, dated 30th Nov. 1852, the deceased Miss Elizabeth Paton conveyed to certain trustees her whole property, heritable and moveable, at her death—First, for payment of her just and lawful debts, death-bed and funeral charges, and the expenses of executing the trust; and 'in the second place, for the purposes specified by me in a sealed letter of even date with these presents, or any subsequent writing I may afterwards subscribe and execute, or any other document or writing clearly expressive of my will, though not holograph or probative; all which instructions and purposes my said trustees shall be bound to carry into full effect and execution.' By a holograph writing or codicil, dated 22d May 1857, Miss Elizabeth Paton directed her trustees to convey and dispose of her property, heritable and moveable, as follows, viz.—'To pay at the first term of Martinmas or Whitsunday next ensuing after my death the following pecuniary legacies, viz.'—After bequeathing a number of legacies this writing proceeds thus:—'To the kirk-session of this parish of Torryburn three thousand pounds sterling, the money to remain in the Government funds, and the interest to be paid partly to such poor respectable persons in connection with the Established Church as they may select from time to time, not upon the parish list for aid; and partly to educate poor lawful children, also in connection with the Established Church.' After making some further bequests, Miss Paton, by the same writing, directs the residue of her means and estate

to be paid over to Messrs Andrew Dewar and John Macdonald, equally between them. In a holograph writing signed by Miss Paton, and, though not dated, evidently written after the codicil quoted above, the following passage occurs:—‘I have given the interest of L.3000 to the poor in this parish, the money to remain in the Government funds; and the other L.1000, and L.400, and L.300 to help to pay the legacies, along with the money of what is sold.’ These writings were found in Miss Paton’s repositories at her death, which took place on the 18th January 1862. From the date of her trust settlement down to her death Miss Paton held three parcels of Government stock:—

1. In New 3 per cent. Government Stock, the sum of	L.4100	0	0
2. In the same stock, the sum of	420	0	0
3. In the same stock, the further sum of	300	0	0

Amount of New 3 per cent. stock	L.4820	0	0
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In this state of the facts the question arose, whether the kirk-session of Torryburn were entitled to a legacy of L.3000 sterling in money, or to stock in the Governments funds, as at Martinmas 1862, to the value of L.3000 sterling, as claimed by them; or only to a legacy of L.3000 Three per cent. consols, estimated at the selling price of that date to be worth only about L.2760 sterling, as contended by the residuary legatees?

The Lord Ordinary (Mackenzie) found that, under Miss Paton’s trust deed and codicil, the kirk-session of Torryburn were entitled to a legacy either of L.3000 sterling, or to have transferred to them as much of the consols belonging to Miss Paton at her death as, according to the selling price at that time, would be of the value of L.3000 sterling, and repelled the objections of the residuary legatees to the kirk-session’s claim.

Against this interlocutor the residuary legatees reclaimed.

The Court to-day, after hearing counsel, refused the reclaiming note, and found the kirk-session of Torryburn entitled to additional expenses. Their Lordships, while arriving at the same conclusion, did so on different grounds.

LYON MACKENZIE v. MACKENZIE’S TRUSTEES.—*Mar. 23.*

Trust—Construction—Interest.

This was an action brought by Mr Lyon Mackenzie of St Martins against the trustees of the late Mr Mackenzie of Newhall, for the purpose of having it found and declared that the pursuer had right to three-fourths of the interest or dividends which had, at the date of raising of the action, accrued, or which might thereafter accrue, on L.3000 of Buenos Ayres stock which had belonged to the said deceased Mr Mackenzie of Newhall, from and since the date of his death, which happened on 1st October 1842, until the said stock should be realized, and the proceeds thereof invested in land, to be entailed as directed by his trust disposition and settlement. It appeared that, at the date of the truster’s death, no dividends had been paid upon the stock for a period of fourteen years, and that then, and for a considerable time thereafter, the market value of the stock had been very small; and that the trustees, acting on the recommendation contained in the settlement, and with the concurrence of the pursuer, had refrained from selling it. It further appears that cer-

tain dividends had recently been paid, and that the stock had of late considerably risen in value. In support of his claim the pursuer maintained that the dividends or profits referred to in the clause *sexto*, above quoted, and which when received were to form part of the free funds of the trust, were simply such dividends and profits as might be due at the date of the truster's death, and not those accruing after that event; and that dividends of the latter class fell to be disposed of in terms of the direction applicable to the interest or profits of free disposable funds. The Lord Ordinary held that the pursuer's claim was not well founded; and to-day the Court adhered, holding that before the heir could become entitled to three-fourths of the interest of any fund, it must have been 'realised' and 'disposable,' and that the stock in question was in neither of these conditions. They further held that the word 'dividends,' in the first clause above quoted, could not receive the limited construction put upon it by the pursuer, but must be held to refer to the dividends which might accrue upon the stock so long as it might remain unsold.

BONTINE v. BONTINE.—Mar. 24.

Entail—Prohibition against Alienation.

This is an action of declarator at the instance of William Cunninghame Bontine, Esq. of Ardoch, against the heirs of entail entitled to succeed to him in the entailed estate of Ardoch, to have it declared that the entail of Ardoch is invalid and ineffectual. The entail contains the usual clauses prohibiting alienation, contraction of debt, and alteration of the order of succession, and also irritant and resolute clauses in proper form. The entail further contained a provision that it should not be lawful to the heirs of entail 'to sett any tack or rental of the same, or any part thereof, for any longer space than two lifetimes, or for nineteen years, or one lifetime after the expiry of the said nineteen years.' It was contended for the pursuer, that the general prohibition in the entail against alienation could not be held to apply or to strike against leases at all, the entailer having framed his deed on the principle of dealing with the subject of the power of leasing under a subsidiary and special clause, and that therefore the entail was defective in the prohibition against alienation—alienation by granting leases not being properly prohibited.

The Lord Ordinary (Jerviswoode) held that, the question not being one of intention on the part of the maker of the entail, but of the construction due to the technical expressions used in the deed, these must be allowed to have the meaning and force, and those only, which the law has already fixed and ascertained as attaching to them; and that, applying this doctrine to the present case, the primary and leading clause of prohibition in the deed of entail directed against alienation must be read as a clause which struck by force of its own terms against the granting of leases for any period beyond such term of endurance as the law holds to be consistent with the due and ordinary administration of an entailed estate, be this nineteen or twenty-one, or any like period of years.

The pursuer having reclaimed, the Court to-day, without calling on the respondent's counsel, refused the reclaiming note, and adhered to the Lord Ordinary's judgment.

BAXTER AND MITCHELL v. WOOD.—Mar. 24.

Trust—Expenses of Litigation.

By ante-nuptial contract of marriage between John Smith, sometime tenant in the Haughs of Kinnaird, and his wife, certain property was conveyed to trustees therein named, for behoof of the wife. Ultimately, the trustees were reduced to two—Mr Wm. Neill, and Mr Smith the husband. Mr Neill at last left this country for New Zealand. Mr Smith, in addition to the fact that his *jus mariti* and right of administration were excluded as to these funds, was a debtor to the trust-estate in a considerable amount. In these circumstances, Mrs Smith (who was living in separation from her husband) presented a petition to the Court for the appointment of a judicial factor on the trust-estate. Mr Smith opposed this application, and assumed two new trustees, who, together with himself, would validly and expediently carry on the trust. The Court appointed a judicial factor, in terms of Mrs Smith's petition, and found no expenses due to or by either party. In the course of these proceedings Mr Smith presented a petition for the removal of Mr Neill from the office of trustee, in order to remove any difficulty as to his assumption of new trustees. The petition was refused, and the Court again found no expenses due to or by either party. The pursuers, who were the agents of Mr Smith in these proceedings, now claim from the defender Mr Wood, the judicial factor appointed by the Court, the amount of Mr Smith's expenses, as expenses properly chargeable against the trust-estate.

The Lord Ordinary (Kinloch) repelled this claim; but the Court to-day altered, and held that Mr Smith was in a measure bound to maintain the integrity of the trust; that he could not well have opposed the application for the appointment of a judicial factor without suggesting some method of carrying on the trust; and that therefore the proceedings he had taken had been properly adopted for the benefit of the trust—far as well as liferenter—and that therefore the expenses incurred should be allowed out of the trust-estate.

SCOLAR v. MACLAUCHLAN.—Mar. 28.

Reduction, Competency of—Pawnbroking.

This case originated in a petition presented by the defender to the Justices of the Peace for Lanarkshire against the pursuer, founded on the 14th section of the Pawnbrokers Act, 39 & 40 George III., c. 99. and praying that the pursuer should be ordained to deliver up to the defender a piece of French merino belonging to her, which had been pawned, and failing such delivery, to find him liable to her in the value of said goods; or otherwise to determine in the said matter, as directed by the said Act, and to find him liable in expenses. The pursuer attended the Justice of Peace Court, and pleaded that the piece of French merino had been taken from him by an officer of police, with a view to a criminal prosecution, and moved that the proceedings against him should be sisted till the result of an action raised by him against the police authorities should be known. By an interlocutor dated 14th November 1861, the Justices refused this motion, and allowed the defender to produce her evidence, after which proof was led on the part of the pursuer. Thereafter, on 5th December 1861, an interlocutor or decree was pronounced

by the Justices, whereby, after setting forth the import of the proof adduced, they 'decern and ordain the said William Scoular, defender, to make payment to the pursuer of L.1, 6s., being the value of the piece of French merino which was delivered to him in pledge as aforesaid, and L.3, 15s. as the taxed expenses of this prosecution, and also to account to the complainer for the 2s. she paid him to cover interest on the sum advanced, in so far as that sum exceeds the interest lawfully chargeable.' This decree has not been extracted. In order to obtain relief against this decree, the pursuer presented a note of suspension in the Bill Chamber, which, after answers were lodged, was passed by the Lord Ordinary on 12th February 1862. That interlocutor, however, was recalled by the Second Division, and a remit was made to the Lord Ordinary 'to hear parties on the grounds of suspension embraced in the first three pleas of the suspender.' On resuming consideration of the case under this remit, the Lord Ordinary, on 19th March 1862, refused the note of suspension. The pursuer then lodged a reclaiming note against this interlocutor, but afterwards departed from it, and resorted to this action of reduction. The defender stated various preliminary defences, and *inter alia* that the decree sought to be reduced was not a final judgment, and at all events that it was extractable, and had not been extracted.

The case having been again debated, the Lord Ordinary pronounced the following interlocutor:—'In respect the process at the instance of the defender against the pursuer is still in dependence before the Justices, and that the interlocutor or decree of 5th December 1861 is extractable, and has not been extracted, sustains the objection to the competency of this reduction, dismisses the action, and decerns: Finds the defender entitled to expenses, including those incurred by her after the date of the interlocutor of 15th July 1862,' etc. Against this interlocutor the pursuer reclaimed, and counsel were heard yesterday and on Thursday. To-day the case was advised.

The Lord President said—This piece of French merino had become a very costly fabric, and the pursuer still desired to spend more money on account of it; but the Court must determine the question according to their view of the law, without regard to the smallness or largeness of the subject in dispute. The view of the law upon which the Lord Ordinary had proceeded was, that the remedy of reduction was not competent where the decree sought to be reduced had not been extracted, unless where the decree could not be extracted by reason of the nature of the action, or where, the judgment being final, suspension and advocacy were incompetent. Agreeing as he (the Lord President) did in that view of the law, he was for adhering to the Lord Ordinary's interlocutor dismissing the reduction as incompetent; and he did so the more readily, that the whole argument of the pursuer went on the footing that the remedy of suspension was open to him.

The Court therefore adhered, and dismissed the action with additional expenses.

Susp. and Int., ISDALE v. JACK.—Mar. 31.

Poor—Relief of the Able-bodied.

This is a suspension and interdict at the instance of Robert Hawker Isdale, hat manufacturer, Dundee, a member of the Parochial Board of

Dundee, and of the Acting Committee of that Board, against Henry Jack, Inspector of Poor of the parish of Dundee, and as representing the Parochial Board of that parish. The question raised is whether a Parochial Board, although not bound to do so, is entitled in its discretion to give relief, either permanent or occasional, out of the fund raised by assessment, to persons who, being able-bodied, are in destitution or poverty merely from want of employment. The Lord Ordinary (Kinloch) decided that a Parochial Board cannot legally afford temporary relief, from the funds raised by assessment, to able-bodied poor out of employment. The respondents having reclaimed, the Court, in respect of the importance of the question raised, appointed the case to be argued in writing, and the pleadings to be laid before the whole Court.

The majority of the consulted judges, consisting of the Lord Justice-Clerk, Lords Cowan, Benholme, Mackenzie, Kinloch, Jerviswoode, and Ormisdale, returned opinions to the effect that the Lord Ordinary's judgment should be affirmed. The minority of the consulted judges—consisting of Lords Neaves and Barcaple—were of opinion that the Lord Ordinary's interlocutor should be recalled.

At the advising to-day the whole judges of this Division concurred with the minority of the consulted judges, holding that whilst the able-bodied poor in a state of destitution have no right to demand relief, it is competent and legal for a Parochial Board in their discretion to afford such relief. The result is that, by a majority of one of the whole Court, it has been decided that a Parochial Board cannot legally afford relief of the nature in question.

CRAIG AND CO. (FORTUNE'S EXECUTORS) v. SMITH'S EXECUTORS.—
Mar. 31.

Triennial Prescription.

This was an action at the instance of the executors' creditors of the late Alex. Fortune, clerk to the late Professor Shank More, for fees incurred by the late Mr Smith, W.S., to Mr Fortune, as Mr More's clerk, from 1832 to 1850. Mr Fortune died in 1855, and the case came before the Court to-day, on a reclaiming note against an interlocutor of Lord Barcaple, finding that 'the triennial prescription applies to the account sued for.'

The Court adhered to the Lord Ordinary's interlocutor.

SECOND DIVISION.

FULTONS v. FULTON AND OTHERS.—Mar. 22.

Trust—Liability for Intromissions of former Trustees.

This was an action at the instance of James Fulton and Agnes Fulton, residing in Glasgow, the only surviving children of the deceased Hugh Fulton, merchant there, with the consent of their curator, James Smith, accountant in Glasgow, against John Fulton and Others. The action was one of count and reckoning, on the ground that the defenders had, without any legal title, taken possession of and intromitted with the whole means and estate left by the late Hugh Fulton. It appears that after his death, on the 4th of January 1849, the deceased's brother

illegally and unwarrantably, as is alleged, procured himself appointed sole executor *qua* nearest in kin. He (William Fulton) realized the estate, which is said to have amounted to L.2284. About a twelvemonth thereafter, Mr Hugh Fulton's widow requested the executor to denude. This he only agreed to do on her executing along with himself a trust deed in favour of himself and the other defenders. The deed was executed on the 18th June 1850, and contained a variety of provisions in regard to the management and disposal of the estate. The defenders having accepted of the trust, they held a meeting on the 18th July 1850, at which William Fulton is said to have produced a state of his intromissions. These the defenders approved of, and docqueted the account accordingly.

The state of that account was as follows, viz.:—

Total amount received	L.2284	16	0
And the total payments, including a sum of			
L.1000 deposited in the Western Bank,			
were	1421	0	0
Leaving a balance of	L.863	16	0

The defenders agreed to allow this balance to remain in the hands of William Fulton on his personal security. He afterwards became bankrupt, and the defenders obtained a dividend from his estate of about L.65. The first questions that came to be argued and disposed of in the case were, whether the pursuers were bound to take over certain investments in heritable property made by the defenders from the funds of the estate; and whether the defenders were liable for the sum of L.863, which they allowed the executor to retain in loan when the trust was constituted. The defenders maintained that, as they had obtained their title from William Fulton, who had been confirmed executor, and as they had been actuated by motives of friendship towards the family, they could not be held liable personally for more than they had actually intromitted with. The Lord Ordinary (Kinloch) decided that the pursuers were not bound to take over the heritable subjects, but that the defenders were bound to account for the monies so invested, and also for the L.863 lent to William Fulton. The pursuers then maintained that the defenders were liable for the rest of the executry under deduction of any *bona fide* payments which had been made to the widow for behoof of herself and children. A remit was made to an accountant to report upon the state of accounts, both as between Mrs Fulton and the defenders, as well as between them and the pursuers. The accountant's report having been obtained, the pursuers objected to it in so far as it debited them with payments alleged to have been made by William Fulton while acting as executor, and for which no vouchers were produced. The Lord Ordinary decided that the defenders, who appear to have acted as *bona fide* trustees, were not liable for the intromissions or omissions of William Fulton previous to the constitution of the trust. The pursuers reclaimed, and counsel were heard yesterday and to-day. On behalf of the pursuers it was contended, that the defenders having accepted an assignation to the whole executry of the late Hugh Fulton, and having approved of and docqueted the accounts of William Fulton as executor, they made themselves responsible for his actings and intromissions. Further, that they could not be regarded, so far as liability

was concerned, as *bona fide* trustees having a legal title, but were liable as pro-tutors for their omissions, as well as intromissions, on the authority of Erskine and the Act of Sederunt of 10th June 1665. On the other hand, it was maintained for the defenders, that they could not be held liable for money they never intromitted with, and which had been lost through the actings of William Fulton, who had a legal title as executor of his late brother.

The Court, to-day, adhered to the Lord Ordinary's interlocutor.

Lord Neaves dissented, on the ground that the defenders had obtruded themselves into the management of the pupil's estate, thereby inducing his proper guardians to abstain from serving as tutors and acting under the statutory regulations and responsibilities, and that therefore they, the defenders, were liable to the same extent as tutors would have been.

Adv., BARCLAY v. THOMSON.—Mar. 25.

Sheriff—Summary Petition.

This was an advocacy from the Sheriff of Aberdeenshire, at the instance of J. W. Barclay, residing at St Devenick Cottage, Banchory-Devenick, against John Thomson, miller, Mill of Cults. The advocator, in January 1861, presented a petition to have the respondent prevented from obstructing 'a public road or footpath, sometimes called the Birley Brae, or the Birley Brae Road, used also as a kirk-road, about three feet in breadth,' leading from a certain point to a certain other point along certain detailed landmarks. The Sheriff-substitute (Watson) allowed a proof, and upon the proof granted the interdict. Upon appeal, the Sheriff (Davidson) recalled the interdict by an interlocutor, to which he appended a note, in which he said—'The ground on which the petition is dismissed is that the road is misdescribed in the petition. It is erroneously described as to its length and proportions, but chiefly as to its situation. It is proved that there is a public footpath; but that is not the path specified in the record. The proof shows that there is no such path as is described in the petition. The Sheriff cannot surmount this difficulty; therefore the petition is dismissed.' Against this judgment of the Sheriff the present note of advocacy was presented. After hearing counsel,

The Court were of opinion that the Sheriff had been hypercritical in dismissing the petition on the ground of the difference between the statements in the petition and the proof as to the line of the footpath. It was clearly proved that there was such a public footpath, and interdict would be granted against any one obstructing it. This was only a possessory question, and it was sufficient to describe the footpath in general terms.

The Court therefore granted the interdict, with expenses.

M'DOUGALL AND HERBERTSON v. THE NORTHERN ASSURANCE COMPANY.—Mar. 28.

Reduction, Misrepresentation, and Concealment.

These are conjoined actions of suspension and reduction at the instance of Messrs D. M'Dougall and H. Herbertson against the Northern Assurance Company, under the following circumstances:—In October 1856. M'Dougall and Herbertson became cautioners for John Dick and Sons,

as tenants in a lease of a threadmill, and the machinery contained in it, heritable and moveable, granted by the Northern Assurance Company as proprietors of the mill and machinery. They became bound on the lease, along with Dick and Sons, for the due payment of a rent of L.1000 per annum. They now contend that they are liberated from the obligation on two grounds. First, They say that the transaction, though ostensibly one of lease, was not so in reality, but was a transaction of security, by which a loan of L.6000 bearing legal interest, made by the Assurance Company to Dick and Sons, was to be rendered safe. The mode of accomplishing the transaction was the very usual one of Dick and Sons granting to the Company an *ex facie* absolute disposition of the mill and machinery, qualified by a back bond, and the Company then granting a lease to Dick and Sons, under which they remained in possession as tenants. M'Dougall and Herbertson allege that the true nature of the transaction was not disclosed to them, and they entered into their obligation in the belief that the transaction was, as represented, a mere transaction of lease. Secondly, M'Dougall and Herbertson say they are relieved from their obligation because the subjects let have been evicted in the following way. The Northern Assurance Company took infestment on Dick and Sons' conveyance to them, but never took possession, or did anything to complete their title to the machinery in the mill. In 1857 Dick and Sons were sequestrated; and their trustee having claimed the machinery as belonging to the bankrupts, a compromise was entered into between him and the Assurance Company, under which the machinery was given up to the trustee, and sold by him for the benefit of the general body of creditors. In these circumstances M'Dougall and Herbertson brought a suspension of a charge of the Assurance Company for a half-year's rent under the lease, and also a reduction of the lease itself. A proof was allowed, upon considering which the Lord Ordinary (Kinloch) assoilzied the defenders from the reduction, and in the suspension found the letting orderly proceeded. The pursuers and suspenders having reclaimed,

The Court to-day were of opinion that the Lord Ordinary had done right in assoilzieing from the reduction, because there was no proof of misrepresentation or undue concealment. But in regard to the suspension, they were of opinion that the letters should be suspended, because the subjects let—or at all events that which made the subjects let valuable, viz., the machinery—had been evicted.

M'DONALD v. THE UNION BANK OF SCOTLAND.—Mar. 30.

Bill—Proof of Value.

This was an action of reduction at the instance of Donald M'Donald, innkeeper, Weem, by Aberfeldy, against the Union Bank of Scotland. The object of the action is to reduce a promissory-note for L.300 granted by the pursuer to the Union Bank, and the only ground of action now insisted in is that the promissory-note was granted without value. This ground of action rested on the circumstances under which the promissory-note was granted. In August 1860 the pursuer indorsed a draft upon the Commercial Bank of Scotland for L.300, drawn by one John M'Donald, sometime cattle-dealer, Torridon, which draft was then

honoured by Mr Rankine, the agent for the Union Bank at Aberfeldy. The draft was sent up to the Commercial Bank, and the answer returned was that the drawer, John M'Donald, had no effects with them. The Union Bank then came against Donald M'Donald, the pursuer, on account of his indorsation. His reply was that he did not indorse with the intention of being liable, and that Mr Rankine, the bank agent, was aware of the understanding on which the indorsation was given. In order to give time to the pursuer, the Union Bank agreed to stay proceedings upon the dishonoured draft, he granting the promissory-note now sought to be reduced. The action of reduction having been raised, the Lord Ordinary dismissed it; but on a reclaiming note, the Court allowed a proof before answer. This proof has now been taken, and counsel heard upon it.

The Court to-day were of opinion that, on the face of the draft of August 1860, the pursuer was clearly liable for the sum of L.300, having indorsed it before the bank agent paid its contents. They were further of opinion that, although it was quite competent for the pursuer to prove that he did not sign the draft, and his indorsation was not taken by the Union Bank on the footing of his being liable for the contents, the proof had completely failed to establish that there was any such understanding at the time the draft was cashed by Mr Rankine. Their Lordships were therefore of opinion that the promissory-note sought to be reduced had been granted for value, and that therefore the action must be dismissed.

M.P., TRUSTEES OF THE LATE J. M. DOUGLAS v. GENERAL MONTEATH DOUGLAS AND OTHERS.—Mar. 30.

Trust—Election.

In this case the Second Division, on the 18th December 1863, appointed parties to be heard on the following points:—(1.) Whether the judicial factor, as representing and administering the trust created by the settlement of Archibald Douglas Monteath, is entitled to demand from James M. Douglas's trustees a conveyance of the estate of Stonebyres; and whether the said trustees are bound or entitled to make such conveyance, and if so, on what condition. (2.) On the assumption that the said judicial factor is not entitled to demand, or the said trustee entitled or bound to make, such conveyance, what amount the said factor is entitled to require shall be stated to the credit of Archibald's estate, in respect of the estate of Stonebyres, or of the money of Archibald's estate expended in the purchase or improvement thereof, in separating the trust fund and effects of Archibald Douglas Monteath from those of James Monteath Douglas; and with a view to the discussion of these questions, the Court appointed the trustees of James Monteath Douglas to state in a minute from what source the money expended in the purchase of the estate of Stonebyres was obtained; also what sums were expended, and at what time, on the improvement of said estate, etc. The trustees accordingly put in a minute stating, *inter alia*, that the estate of Stonebyres was purchased in November 1842 for the sum of L.25,500; that the late J. M. Douglas spent L.23,000 in permanently improving the estate; that the estate is now worth the original price, *plus* the sums expended in improving it. The judicial factor put in answers generally denying the statements in the minute, except as to the original price of Stonebyres. Counsel having been heard, the case was advised to-day. After 'finding' on the facts,

their Lordships in an interlocutor say:—Find that in the event of the said factor and the said General Monteath Douglas electing not to take a conveyance of the said estate of Stonebyres, under the conditions foresaid, they will then be entitled in the accounting to receive payment of or credit for the said sum of L.25,500 paid out of the funds of the said Archibald Douglas Monteath as the price of the said estate, with any interest that may, upon a just accounting, be held to accrue thereon, after making allowance for the liferent use and enjoyment by the said James Monteath Douglas of the said sum, as part of the residue of the said Archibald Douglas Monteath; and appoint the judicial factor of the said General Monteath Douglas to state in a minute in what way they intended to exercise the option to which they are entitled in terms of the above findings.

APPEALS IN THE HOUSE OF LORDS.

PITT v. PITT.—*April 6.*

The facts bearing upon this appeal (which related exclusively to the jurisdiction of the Court) are explained in the following judgment:—

The Lord Chancellor said: This was an appeal from an interlocutor pronounced by the Lord Ordinary in the Court of Session, and adhered to by the Inner House. The suit had been instituted by Colonel Pitt against the present appellant, Mrs Pitt, for a divorce. Preliminary defences were put in; among them the plea of jurisdiction arose, and the question on the issues then raised was determined in favour of the respondent. It was admitted by the Lord Ordinary, and also by the judges of the Inner Division, that the jurisdiction of the Court depended on the question of the domicile of Colonel Pitt, the pursuer in the action in the court below. The Lord Ordinary was of opinion that Colonel Pitt's domicile was in Scotland; that for all intents and purposes his domicile was complete; and that he had not merely acquired in Scotland a sufficient domicile for the purpose of the jurisdiction of the Court. The Inner House did not quite agree with the Lord Ordinary in that opinion. The majority of the judges seemed to be of opinion that Colonel Pitt was not absolutely domiciled in Scotland; but that some domicile short of an absolute and complete domicile would be sufficient—a forensic domicile—to confer jurisdiction on the Court, and therefore they adhered to the interlocutor of the Lord Ordinary. At the bar it was admitted by the counsel for the respondent that the proper view of the case—indeed, the only view of it they could take—was that taken by the Lord Ordinary; that Colonel Pitt had acquired a complete domicile in Scotland, and had thereby put off and lost his original domicile in England. It would be unnecessary, therefore, to consider the very important questions of jurisprudence that might be involved in this case, if their Lordships came to the conclusion that Colonel Pitt had not an absolute and complete domicile in Scotland. If he was not domiciled in Scotland to all intents and purposes, then by the admission of the counsel for the respondent it would be impossible, in accordance with law, to maintain the interlocutor which had been pronounced in Scotland. The facts were extremely simple, and there was fortunately no discrepancy or conflict in point of evidence. Colonel Pitt, being in a state of great pecuniary embarrassment, was obliged to quit England and fly the country by reason of the demands of his creditors in

1854. He went to Scotland in the autumn of that year; and the object of his going to Scotland was to find a secure and convenient hiding-place. He endeavoured to accomplish that end by assuming different designations; and after he had been resident in Scotland three or four years, he very graphically and correctly describes himself as tired of the life he had led—'weary of dodging about as Parsons or Phillimore,' these being the aliases which he had at different times assumed. The Lord Ordinary thought there was no ground for imputing to Colonel Pitt a final intention to relinquish his English domicile until the 9th of May 1858, when he took a lease for six years of a shooting-lodge at Kilninver, on the west coast of Scotland. The Lord Ordinary appeared to have arrived at the conclusion that immediately upon his acquiring that settled place of residence, by way of contrast to the mode in which he had spent his time previously at other places in Scotland, he must be properly considered to have acquired a new and complete domicile. Now he (the Lord Chancellor) could not concur in that conclusion. Colonel Pitt had left England, as he himself said in one of his letters, from necessity and not from choice. He spoke of his residence in Scotland as a residence under the influence of that necessity; and the intention of Colonel Pitt was abundantly illustrated by his own declarations in letters written both at the time of his acquiring this settled residence at Kilninver, and also subsequently, down to the period when it was most material to ascertain his position—namely, December 1860, when the suit for the purpose of obtaining a divorce was instituted in the Court of Session. From these letters it was clear that Colonel Pitt, both before he took the lease and subsequently, was in constant communication with the solicitor and his friends, for the purpose of ascertaining in what manner he could be released from his debts and liabilities. On one occasion he had formed a design, about which he corresponded with his brother (Lord Rivers), for making a conveyance of a reversionary interest or remainder which he had in an estate, and then passing through the Insolvent Debtors' Court. At a subsequent period he expressed his determination to get rid of his debts through the medium of a Scotch bankruptcy,—a proceeding then a common one, but on which some restraints were put by the provisions of the Bankruptcy Act of 1851. He found, therefore, that Colonel Pitt, throughout the whole of this period, was chafing under the necessity in which he was placed—meditating the mode of finding some escape from his debts and liabilities, and evincing the greatest possible anxiety to return and live in England, so that he might have unrestrained communication with the members of his family, for whom he appeared to entertain the warmest affection. Under these circumstances, was it possible to impute to him an intention of finally relinquishing his English domicile, and acquiring a new domicile in Scotland? The whole of his correspondence contradicted such a notion. There could be no doubt as to his deliberate intention, if he could obtain the means, of being free from his debts. There was no possibility to doubt that he would have quitted Scotland instantly, or with the greatest possible alacrity, and returned to the place of his original domicile. There was no animus of deliberately acquiring a new domicile in Scotland, and altogether putting off his English domicile. If that could not be imputed to Colonel Pitt, it was impossible to hold, according to the just rules of law as admitted by counsel at the bar, that

the order pronounced in the Court below could be maintained. Were it not necessary, which he trusted it would not be, to arrive at a different conclusion, he should have felt the greatest possible difficulty in holding that the domicile of the husband must be regarded in law as the domicile of the wife, by construction or by fiction, so as to compel the wife to follow the husband, and become subject, for the purpose of divorce, to the jurisdiction of the tribunal of any country in which the husband might choose even for that purpose alone, to fix and declare that he meant to acquire a new absolute domicile; but it was unnecessary to enter into the question, for he trusted their Lordships would agree with him in considering that there was nothing to warrant the inference that Colonel Pitt had put off his English domicile, and deliberately, *ipso facto*, chosen a Scotch domicile. He recommended their Lordships to reverse the decision of the Court below, and declare the appellant absolved from the whole conclusions of the action.

Lord Chelmsford and Lord Kingsdown concurred.

YELVERTON *v.* YELVERTON.—*April 6.*

The Appeal Committee of the House of Lords, on the same day, disposed of a petition presented by Mrs Yelverton to pay her L.500, to enable her to defend her interest in the appeal. Various authorities were cited to show that the rule of law in such cases was, that if a lady made out a strong *prima facie* case of marriage, the Court would, before the final decision, award her some alimony. The good faith of the case was wholly on her side. The defences which were pleaded were submitted to be extremely dishonest; and, at all events, the burden of proving them clearly fell on Major Yelverton, and the Court of Session had decided that he had failed in the proof. In these circumstances, it was submitted that a man who had thus placed himself in the condition of being *prima facie* married, must bear the burdens of a husband in the first instance, and afford to the lady he had deserted the means of fairly trying the case on such a defence. On the other side, it was argued the cases cited did not apply, and that the Court of Session, and not the Appeal Committee, was the proper tribunal to dispose of such an application. The Lord Chancellor said his own impression rather was that such application should not be entertained before the Appeal Committee; but he found from the case of *Blake*, which had been referred to, that so far back as 1828 Lord Lyndhurst had acted on an opposite principle, which could not now be disturbed. He thought that in this case the judgment of the Court of Session must, in the meantime, receive effect, and that this lady was, for the present, entitled to the status and rights of Major Yelverton's wife. The report of the Committee would therefore be that Major Yelverton should pay her L.150, and that her case should be lodged in three weeks, which would insure the cause being disposed of this session.

English Cases.

ADMINISTRATION OF ESTATE.—The administrator of an intestate's estate paid to seven out of eight of the next-of-kin L.1250 on account of each share, and made only small payments on account of the remaining share. In distributing the residue of the estate, after a lapse of thirty years, the persons claiming the last-mentioned share insisted that for the purposes of distribution a sum of L.1250 ought to be treated as having been set apart on account of their share, and interest at L.4 per cent. to be allowed thereon, and that the small payments ought to be treated as having been made on account of the interest on that L.1250. It was held, that this would be conferring a benefit in the nature of compound interest on the claimants of the unpaid share, and the only mode of equalization which the rules of the Court allowed was to charge each recipient with the amount paid to him, together with simple interest at L.4 per cent. from the date of payment. An administrator having advanced a sum consisting partly of the intestate's and partly of his own monies on a security which it was apprehended would prove deficient, it was held, that the deficiency, if any, must be borne by his own share of the monies advanced in exoneration of the intestate's estate. *Kindersley, V.-C.* : It is said that the direction for apportionment is wrong, for a reason which I may say at once amounts to a complaint that compound interest is not charged. . . . But this amounts to the same thing as saying that simple interest is not strict pecuniary justice, and no doubt it is not. Strict pecuniary justice is never done in any case where a man does not get compound interest: that is, if A. owes B. a debt with interest, and A. does not pay for twenty years, that is unreasonable; but B. gets no more than simple interest, amounting to the rate reserved in the contract. Strict justice is never done unless the creditor gets paid his interest exactly at the time at which it ought to have been paid according to the contract. Take the stronger case of a testator leaving an annuity, meaning it probably for the annuitant's subsistence: it is settled by a series of decisions, although the Courts have struggled to do something like justice, that you cannot have interest upon arrears; that no doubt is a very hard case, but so it is. The Court considers that it is better to have a rule of law easily worked out, than an elaborately contrived one, inflicting mischief upon those it was intended to benefit, and involving heavy expense and litigation in endeavouring to work it out. The mischief in this case, if there is mischief following from the want of strict arithmetical justice, arises from the habit of the Court not to allow compound interest; and there being no instance in which the Court has ever done it, all I can say is that the decree is right in that respect.—(*Lambe v. Orton*, 33 L. J., Ch. 81.)

MARRIAGE SETTLEMENT.—A marriage settlement contained a covenant, that if at any time during the coverture the husband or wife, or either of them in her right, should by gift, descent, succession or otherwise become entitled to any real or personal estate of the value of L.100 or upwards at any one time (other than interests which should be restricted to the life of the wife, or which, whether so restricted or not, should be settled to her separate use), then that the same should be settled upon the trusts of the settlement. After the marriage real and personal estate was given by will unto and to the use of the wife and her husband, their heirs, executors, administrators, and assigns, as joint tenants; and it was held, the property given by the will was not within the terms of the covenant.—(*Wood, V.-C.*; *Edye v. Addison*, 33 L. J., Ch. 132.)

ILLEGAL CONSIDERATION.—W. O. B., by a settlement expressed to be made in consideration of an intended marriage with the niece of his deceased wife, and of his natural love and affection for his children by his late wife, assigned cer-

tain funds to trustees upon trust for herself until the solemnization of the intended marriage, and after solemnization upon trusts for the benefit of himself, his intended wife, and the children of his former wife and of his then intended marriage. He afterwards died in debt. Upon a bill by creditors, it was held by the Master of the Rolls, that the legal and illegal considerations for the deed were so mixed up together that the deed was void; and, on appeal, the Lords Justices affirmed the decree, but on the ground that no marriage had ever been solemnized within the proper meaning of the settlement, and that the first trust in favour of the settlor remained therefore in force. Lord Justice Knight Bruce said: That the first trust in this settlement was for the settlor, his executors, administrators, and assigns, until the then intended marriage should be solemnized between himself and the lady therein mentioned; and the first question was, what was the meaning to be ascribed to the word 'solemnized,' as used in that instrument? As it was used in that instrument, he thought that it must mean validly and effectually solemnized. The ceremony of marriage was indeed gone through afterwards, but the lady and gentleman were domiciled in England, and their domicile had not been changed, and the lady was his wife's niece. Therefore, although the marriage ceremony took place at Neufchatel, it was as ineffectual as if there had never been any such ceremony at all.—(*Chapman v. Bradley*, 33 L. J., Ch. 139.)

CONTRIBUTORY.—A shareholder in a joint-stock company was chosen director and acted as such, but, wishing to get rid of his shares, applied to the managing director, and entered into an arrangement that if the latter would find a purchaser for the shares he (the managing director) should have L.10 per cent. commission on the transaction. Subsequently the shareholder transferred direct to the company, the purchase-money for the shares being taken in part payment for annuities granted by the company to the shareholder, and paid the managing director the balance of the consideration for the annuities, and the L.10 per cent. The deed of settlement authorized the purchase of shares by the company, provided that it should not be lawful for the directors to purchase any shares without the authority and sanction of a general meeting of proprietors previously in that behalf obtained. The only notice of the transaction at any general meeting appeared to be an obscure reference to it in a balance-sheet presented at a subsequent meeting; but the minutes of what took place at the meetings of the company were generally inaccurate, and the company exercised acts of ownership over the shares so transferred. Five years elapsed, and the company was ordered to be wound up. It was held by the Lord Chancellor, that it was not necessary that the sanction of a general meeting should be obtained previously to any treaty for the purchase of the shares, but only previously to the contract becoming finally binding, and that under the circumstances it must be assumed as against the company, that the transaction was properly submitted to a meeting and sanctioned; and consequently (reversing the decision of *Kinderley, V.-C.*) that the transfer was valid, and the transferor must be struck off the list of contributories. It was also held, that the stipulation for the allowance of commission did not affect the transaction as between the transferor and the company.—(*In re the British Provident Life and Fire Assurance Society, re Lane*, 33 L. J., Ch. 84.)

COPYRIGHT.—By the effect of section 18 of 5 & 6 Vict., c. 45, the proprietor of a periodical is precluded from republishing, without the consent of the author, articles written by the latter for and published in such periodical in any other form than as reprints of the entire numbers of the periodical in which those articles appeared. And a republication in supplemental numbers of a selection of tales formerly published in a periodical, is a separate publication within the section. *Stuart, V.-C.*: The proviso in the 18th section of the 5th and 6th Vict., c. 45, which prohibits a publication 'separately or singly,' is intended for the benefit and protection of authors; and this Court in previous cases has, and I think wisely, construed the language of the proviso so as to afford that protec-

tion which was thereby intended by the Legislature, and being so intended, it is the duty of the Court now to give the relief asked. In the case of *the Bishop of Hereford v. Griffin* (16 Sim. 190, S. C. 17 Law Rep. (N. S.), Ch. 210), it was said in argument that the meaning of the clause was not to vest the copyright of an article in the proprietors or publishers of a periodical work, but simply to give them a licence to use the matter for a particular purpose. That view was adopted by the late Vice-Chancellor of England in that case, and subsequently by Vice-Chancellor Sir W. P. Wood in *Mayhew v. Maxwell* (1 Jo. and H. 312): and that is the view which, upon the construction of the language of the Act, fortified by those authorities, I feel myself bound to take in this case.—(*Smith v. Johnson*, 33 L. J., Ch. 137.)

FOREIGN CONTRACT.—Held by the House of Lords, affirming the judgment of Wood, V.-C., that in the construction of a foreign document in the English Courts, the judge or Court must obtain, first, a translation of the document; secondly, an explanation of any terms of art used in it; thirdly, information on any special law; and, fourthly, on any peculiar rule of construction of the foreign state affecting it; and it is the duty of the English Court with such light to construe the document.—(*The Duchess di Sora v. Phillips*, 33 L. J., Ch. 129.)

WASTE.—The rights and interests of tenants for life and remaindermen, in reference to timber felled and mines won by a tenant for life impeachable for waste, discussed and considered. And, *semble*—1. That the tenant for life may work abandoned mines where the previous working has been stopped merely from inability to carry it on at a profit. *Secus*, if stopped with a view to the permanent advantage of the estate. 2. That the tenant for life may cut oak coppice in due course for his own benefit, when the custom of the country so permits, and may also take the profits which arise from the periodical thinning of woods. 3. That the proceeds of timber cut and minerals won, with a proper regard to the benefit of an estate, by a tenant for life impeachable of waste, will, by the rules of the Court of equity, be invested and dealt with as part of the corpus of the estate, the tenant for life, though impeachable of waste, receiving the income. 4. That the proceeds of timber and minerals improperly cut and won at a time when there is no person *in esse* unimpeachable for waste, must be similarly dealt with, except that the tenant for life, improperly acting, cannot receive the income. 5. That the proceeds of timber and minerals improperly cut and won by a tenant for life impeachable of waste, at the time when there is in existence a remainderman entitled indefeasibly to the first estate, unimpeachable of waste, belong absolutely to such remainderman. 6. That notwithstanding the popular notion to the contrary, the proceeds of windfalls of timber must be invested and dealt with as part of the corpus of the settled estate.—(*Bagot v. Bagot*; and *Legge v. Legge*; Master of the Rolls, 33 L. J., Ch. 116.)

REVOCATION.—A testamentary paper purporting to be a codicil to a will, but being substantially independent of it, is not necessarily revoked by the revocation of the will. Sir J. P. Wilde: The only question is, whether the codicil is independent of the will. The testator appears to have made the will in order that his property might not fall into the hands of the railway company with which his son was connected, and with that view he gave all his property to trustees, in trust to pay annuities of L.1000 each to Mr and Mrs Ellice, etc., and subject thereto, to retain possession until his son should be completely freed from his liabilities in connection with the company. The danger of the calamity against which the will had provided having passed away, the reason for the will ceased, and it was therefore destroyed. But the codicil, although it purports to be a codicil to the will, is substantially independent of it, and therefore was not revoked by the destruction of the will.—(*In the goods of Ellice*, 33 L. J., Ch. Pr. and M. 27.)

THE

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ON THE LIABILITY OF DIRECTORS AND OTHER OFFICIALS OF PUBLIC COMPANIES.

SINCE the passing of the 'Companies Act, 1862,' there has been formed in the United Kingdom, on an average of working days and Sundays, about one new company for every day of the year. Financial companies, companies for banking and insurances of all kinds, companies for steam navigation, telegraphing, railway plant making, steel manufacture, cork-cutting and baking, etc., etc., alternately bid for public support, with apparently certain returns of from 15 to 50 per cent. Of the new banking companies especially, the name is legion. The world is ransacked for districts which may give them a local habitation and a name. The 'London and Shetland Banking Company, limited,' the 'Timbuctoo and Central African Banking Company, limited,' with a host more, seem each to have found for themselves a rich and unoccupied field of operations. The joint stock principle is undoubtedly an important and rising power in the commercial aspect of this country. Perhaps the most significant tribute to its growth might be seen in its absorption, the other day, of one of the foremost among the great old private banking establishments in London. It becomes, therefore, every day more interesting to inquire what are the liabilities and responsibilities of the various parties by whom such establishments are set afloat and conducted. How far are the promoters answerable to the public, who are induced to embark in these undertakings? how far, when the undertaking has been entered on, are the directors and other officers answerable to their constituents? and how far are they responsible to members of the public who may, influenced by their representations, become shareholders in the company? We are

not about here to discuss the liability of promoters; but the responsibility of directors and other officers of a public company to their constituents and to the public—a question which has, in our courts, given rise of late to cases of considerable importance and interest—will form the subject of the remarks in the following paper.

And first, a few words upon the common law relating to the subject, apart from any specialties of the deed of constitution of the company. The principles of all contract law, with regard to responsibility for fraud or fault, are taken from the Roman law; borrowed from it with us, stolen from it in England. With regard to the distinctions made by the Roman lawyers, there is a controversy among German professors whether three degrees of fault or negligence, and of consequent responsibility, were recognised, or only two. Our own Erskine, who understood the Roman law as a practical system better than all of them put together, says there are three,—namely, *culpa levissima*, *culpa levis*, and *culpa lata*,—the contract exacting from either of the parties in question the higher, the middle, or the lesser degree of diligence, according as it is for his benefit alone, for the benefit of both parties, or for the benefit of the other party alone. In the contract of partnership, however, a different criterion has been applied; the diligence there required, being not regulated by any fixed standard, but being the diligence which he is wont to exhibit in the conduct of his own affairs, *diligentia quam suis rebus adhibere solet*; the argument being, that a man has himself to blame if he chooses to cast in his lot with a negligent or unskilful partner. In all contracts, parties are liable for the consequences of their own fraud. Except in the case of fraud, these general rules may be modified by the terms of the contract; but whatever be pretended by those who hold out a peculiar degree of indisputability in their contracts, it has never been supposed among lawyers that a party can stipulate exemption from liability for his own fraud.¹ Want of the skill required for the particular business, is in the contract of hiring deemed equivalent to that negligence which would render the party liable, or to *culpa levis*.

The responsibilities of a manager or other salaried employé of a company, seem clearly enough to belong to those of the contract of hire; and *culpa levis*, that is, negligence or want of skill in the con-

¹ L. 23, D. de reg. jur. (50, 17): legem enim contractus dedit, excepto eo, quod Celsus putat, non valere, si convenerit ne dolus præstetur; hoc enim bonæ fidei iudicio contrarium est; et ita utimur.

duct of the business, whatever that may imply, appears to be the simple criterion of responsibility at common law as between him and the company. The case is by no means so clear with regard to directors. The preliminary question occurs, as to what is their legal *status*, and what is the real nature of the contract between them and the general body of shareholders of the company? Are their responsibilities to be determined as simply those of partners towards each other,—a responsibility which must be judged of with due allowance for the party's personal qualifications, his other avocations, and the *bona fides* of the intentions of his various actings; or is the position that of remunerated officials who undertake to give up a certain amount of time, and to supply a certain degree of professional skill, towards the conduct of the business? On the one hand, it is said that the office of director in an important company is a position of great influence, which is eagerly desired on that account; and that directors, at each meeting of the board or committees at which they are present, are paid and remunerated for their services. On the other hand, it is said that the services, and even the use of names of people in high position to fill the office of director, is a thing eagerly desired by the shareholders; that such men are invited and pressed to undertake the office, on the understanding that a very general supervision of affairs, and the devotion of such time as they can easily spare, and the exercise of such skill as a person of ordinary common sense is master of, is all that is required of them; that the directors' fees, their so-called remuneration, are so small as not to be really any object to them, still less an equivalent for the risk they run, if they are to be held accountable for any slight negligence or want of skill in the conduct of the affairs of the company; and finally, that if they devote to those affairs such time as they can reasonably be expected to spare, bringing to bear upon them such common sense as they are accustomed and are expected to use in the transaction of their ordinary business, and all this with the *bona fide* intention of doing their best for the company, they have then fairly done their duty by their constituents, and cannot be held responsible for the unfortunate results of a mistaken course of policy.

The question of the liability of directors to their constituents was raised nearly in its abstract form in the case of the liquidators of the Western Bank against the directors; a case which, if it had been carried to the end against all the defenders, might have given the

general question a good chance of discussion. Even there, however, there was a protecting clause in the contract in favour of the directors, absolving them from liability for omissions, and confining the liability of each to his own actings and intrusions only. But this celebrated case, after discussion of the preliminary pleas, was withdrawn as against the greater number of the defenders called; and though the summons was found still to contain relevant matter against the other two, the form of the averments as applicable to them alone was so inconvenient, that it was found expedient to abandon the action. The action, it must be remembered, as insisted in against two of the defenders alone, stood on much narrower grounds than those on which it rested when concluding against all the directors for the time being with reference to the acts at each particular period. For it is only on the ground of delict, such as fraud or gross negligence, that a party is allowed to single out one or more of the wrongdoers at his pleasure, and proceed against them without reference to the others. As all claims arising out of the failure of the Western Bank have now been finally settled or compromised, we can expect from the questions arising out of these transactions no further exposition of the legal responsibilities of the several parties concerned in such companies. The case, however, well illustrates some of the practical difficulties in the way of making directors liable, even if the law should ultimately hold them so, for any ordinary negligence or want of judgment in the management of the company's affairs. For to fix such a liability, you must, in the first place, call *all* the parties guilty of the acts in question, and you must trace distinctly the share of each in such acts, and the loss resulting from the several actings in which different parties are implicated. This is fair; because if I charge simple mismanagement against a person or body of men, I am bound to show exactly the points in which the alleged mismanagement consists; that is, I am bound to show what should have been done, and what the difference would have been to the company had the affairs been managed properly. It is different with a case of alleged fraud, or such gross negligence which, like fraud, may be said to amount to delict. In that case, it has been distinctly held that the pursuer has a right to single out any one of the delinquents, and proceed against him for the whole damage, without relief against the others.—See the case of *Leslie's Representatives v. Lumsden* (Aberdeen Bank), Dec. 17 1851, 14 D. 213. Again, it is only to the company itself, and not to indivi-

dual shareholders, that directors or other officers could be made liable for simple mismanagement. If nothing were alleged to be done but what the general meeting of the shareholders might have ratified, there might be strong reason to suppose that, according to the English authorities, and what is understood to be the practice of that part of the kingdom, an action might be brought by the company, but could not be brought by an individual shareholder;¹ and although the dictum just quoted is *obiter* to the case where it is given, the principle is one which appears to have been pretty generally assumed throughout the class of cases with which we are now dealing; and it appears to have been the ground upon which, in the case of *Leslie* above quoted, the instance of a single shareholder was held sufficient to make the action competent.

But although the practical difficulties are great in the way of bringing home to directors a liability for want of mere ordinary diligence and prudence, still, the history of such actions should be a warning to directors, in the commencement of such undertakings, to see that the protecting clause in their contract is made as ample and explicit as possible; protecting them, in fact, from all liability except that which may arise from fraud, or such gross negligence as the law holds equivalent to fraud, against the consequences of which no express stipulation can protect them. Whatever stipulations may be made, there is danger enough in the case of an undertaking which, whether through mismanagement or mere misfortune, comes to a disastrous termination, that the directors and officials will have all the trouble and anxiety of actions attempting to fix the liability upon them. It is only fair, therefore, that they should at the commencement obtain all the protection which express stipulation can give them. The shareholders must then look to their own choice in the selection of directors, having a remedy only when the men they choose are guilty of wilful and fraudulent malversation.

The other great case (*Inglis v. Leslie, etc.*) arising out of the Western Bank is one of a class of cases to which we shall now more especially direct our attention; and to which belongs the case (*Cullen v. Johnston etc.*) arising out of the Edinburgh and Glasgow Bank, the trial of which, last spring vacation, excited so much interest, and resulted in the failure of the jury to agree upon a verdict. A similar interest at the time was excited by the companion case of *Dobbie*

¹ Per Lord Chancellor, in *Davidson v. Tulloch*, House of Lords, Feb. 23, 1860; 3 Macqueen, 792.

v. Johnston, etc., which was tried in the spring of 1861, and resulted in an acquittal of the defenders. Of the same class is the case of *Tulloch v. Davidson, etc.*, which arose out of the failure of the Aberdeen Bank, and in which the discussion of relevancy and issues elicited from the House of Lords some very important principles regarding the liabilities in question, and the proper mode of pleading in such cases. All the cases here mentioned are actions brought by persons alleging that they have been induced to buy shares in the companies in question by the misrepresentation of the defenders. And in order to show clearly the points illustrated by these cases, we shall take each singly, and state shortly the points which appear to have been decided, and the views more or less authoritative which have been thrown out in the course of each case severally.

The case of *Tulloch and Others v. Davidson and Others* was an action brought, after the failure of the Aberdeen Bank, against the representatives of a party who had been one of the directors of that bank, by the representatives of a party who it was alleged had been induced to purchase shares through the fraudulent misrepresentations contained in reports emanating from the defender's author and certain other directors. It was held in the Court of Session, that the action being laid upon the ground of fraud, was tenable against the defender's author without calling the other directors who were alleged to be participants in some of the acts in question. This was understood to have been decided in the previous case of *Leslie*, above referred to. That case was also held applicable to the present, in so far as it was there held that the action on the ground of fraud was competent although brought at the instance of a single shareholder, and not of the entire company. So far the title of pursuers and defenders in both actions stood on the same footing. But in the case of *Tulloch*, the pursuer's title was further complicated by the consideration that the principal acts complained of as fraudulent, namely, the representations made by the directors, were previous to the time of his becoming a shareholder in the company, being in fact the representations on the faith of which, as was alleged, he purchased his shares. The plea of the defender upon this point involved both the pursuer's title and the relevancy of the action, and accordingly in this case both questions were disposed of together. It was held, that as the market price of shares depends in a great measure on the reports circulated by the directors, such reports affect the interests of a stranger purchaser directly enough

to give ground for a legal liability between him and the author of the reports; and further, that the reports being here alleged to have been published and circulated so as to become known to the public, and among others, to the pursuer's author, his interest in the good faith of these reports becomes still more direct. The averments of fraudulent actings, which were certainly pretty thickly laid on, those in the case of *Leslie* having been found insufficient to infer a relevant action, were in this case found relevant, and the following issues were adjusted :—

‘1. Whether, on or about 3d October 1834, the late Dr T. was induced to purchase ten shares, of L.100 each, of the stock of the Banking Company at Aberdeen, at the price of L.1910, by false and fraudulent representations made by the deceased Duncan Davidson, advocate in Aberdeen, and other persons acting along with him, as directors of the said banking company, in regard to the affairs thereof, to his loss, injury, and damage? Amount claimed, (1.) L.1910, being the price paid for said shares, and interest since 3d October 1834; and (2.) L.250, being the amount of a call paid on said shares, with interest of first instalment of L.125 thereof from 3d May 1843, and interest of remaining instalment of L.125 thereof from 4th December 1843, under a deduction of the dividends received by Dr Tulloch.

‘2. Whether the said Duncan Davidson, while a director of the said banking company, and others acting along with him as directors thereof, did fraudulently, and in violation of their duties as directors, make large advances out of the funds of the said banking company to etc. etc., all merchants there, or to any of these parties, knowing or having reason to believe that the same would not be repaid, whereby the value of the shares of the stock of the said company held by the late Dr Tulloch was destroyed or greatly depreciated, to his loss, injury, and damage? Damages claimed, L.3000.

‘3. Whether the said Duncan Davidson, while a director of the said banking company, and others acting along with him as directors thereof, did fraudulently, and in violation of their duties as directors, misrepresent and conceal from the shareholders the true state of the bank's affairs subsequent to 3d October 1834, whereby the late Dr Tulloch was deprived of the means of bringing about a dissolution of the said banking company, and of otherwise preventing or alleviating the depreciation of the value of the stock of said company, to his loss, injury, and damage, as holder of certain shares thereof? Damages claimed, L.3000.’

The opinions elicited from the House of Lords upon the appeal of the judgment above described, appear to establish the following important points with reference to the class of cases in question :—1st, That it is the law of Scotland, that if by a delict there is a pecuniary loss occasioned, and the party dies who was guilty of that fraudulent misrepresentation, an action lies against his executor, if the executor is *lucratus* ; and the meaning of this last expression is this, if the executor has assets in his hands of a person who has made himself liable by his wrongdoing. 2d, That when the allegations showed a concurrence of *damnum cum injuriâ*, *primâ facie* an action lies. That if nothing had been alleged as done by the defender's author and his co-directors but what the general meeting of the shareholders might have ratified, there might have been strong reason to suppose that, according to the English authorities, and what is understood to be the practice in that part of the kingdom, an action might be brought by the company, but could not be brought by an individual shareholder. But where there are allegations of frauds and of actings such as could not be ratified by the company, it is quite competent for the action to be maintained at the instance of an individual shareholder. 3dly, That the allegation that the pursuer's author was induced to purchase shares, relying on the value attached to these shares by the fraudulent misrepresentations of the defender's author and others, was a sufficient allegation of a wrongous proceeding whereby the pursuer was damnified. 4th, That the proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the shares in the circumstances of the company at the time of purchase.¹

The case of *Inglis v. Douglas and Others*, which was raised upon somewhat similar grounds with the preceding, is, like the rest of the cases arising out of the Western Bank, extremely unsatisfactory with regard to any light which it throws upon the principles of law relative to the liability of the several parties concerned. It was originally an action directed not only against the several directors, but also against the Western Bank itself, and against the liquidators of the bank. The conclusions against the bank itself and the liquidators having been withdrawn, the case as laid against certain directors as individuals, conjunctly and severally, or severally, or

¹ *Davidson v. Tulloch*, H. of L., Feb. 20, 21, and 23, 1860 ; 3 Macqueen, p. 783.

otherwise, according to their several liabilities, as might be determined in the course of the process, came to be argued upon relevancy. It was held that the record contained some relevant averments; the record was allowed to be opened up, and the pursuer allowed to give in a revised condescendence specially applicable to the conclusions of the action which had not been departed from. When the case came before the Court on the new record prepared in obedience to this interlocutor, there was a minute to the effect that the action was not maintained as founded upon violation or neglect of duty apart from fraud. The Court held, that with regard to two of the defenders, facts amounting to fraud were not sufficiently averred. The issues as finally adjusted against Mr D., one of the defenders, were as follows:—

‘1. Whether the pursuer purchased, (1) on or about the 15th day of October 1857, twenty shares of L.50 each of the stock of the Western Bank of Scotland, at the price of L.1492, 10s. sterling or thereby; and (2) on or about the 16th day of October 1857, other twenty shares of L.50 each of the stock of the said bank, at the price of L.1420 sterling or thereby?’

‘2. Whether the pursuer was induced to purchase the said shares by false representations as to the affairs of the said bank, fraudulently made and promulgated in or about the months of June 1856 and June 1857, by the defender D., to the loss, injury, and damage of the pursuer?’

And separate issues were adjusted in similar terms, applicable to each of the other defenders.

We now come to say a few words upon the cases arising out of the Edinburgh and Glasgow Bank, the recent interest of which has suggested the present paper. And here, at least, the legal profession cannot complain of absence of light upon the subject arising from want of persistency in the parties carrying on their actions. And although the cases add to the principles settled in the previous cases little matter under authoritative judgment of the Court, yet the charges to the jury in the two cases are important as well as interesting, as giving the views expressed respectively by the two Heads of the Court upon the important question, as to what is the precise meaning of the terms false and fraudulent in an issue adjusted for the trial of a case such as those under discussion. The first issue in the case of *Dobbie* was very similar to those already

quoted from the previous cases, and the gist of it was in these terms :—

‘ Whether the pursuer was induced to purchase the said stock by false and fraudulent representations, made on or about the 4th and 5th days of the month of February 1858, by the defender, Sir William Johnston, acting by himself and with others, as directors of the said bank, in regard to the affairs thereof, to the loss, injury, and damage of the pursuer ? ’

The alleged misrepresentations were contained in a report of the directors to the shareholders, which it was said purported to contain a candid and full statement of the position of the bank. It disclosed, on the one hand, a very large loss of capital which the bank had sustained ; but, as alleged by the pursuer, greatly under-estimated that loss, and falsely and fraudulently represented the state of the bank as much better than it really was. The Lord Justice-Clerk, in charging the jury, distinguished between several shades of meaning in the word ‘ false ’ as applied to representations. ‘ A false statement may mean one of several things in relation to the party making it. It may mean merely that it is inconsistent with fact or contrary to fact, and involves no personal imputation against the party making the statement. It may mean, upon the other hand, that the statement is made by a person who knows it to be untrue ; and the distinction between these two things is very palpable, and requires no illustration. But there is a certain condition of the mind of the person making the statement which stands between these two extremes. In the first place, a man may not know the thing that he states to be untrue—may not absolutely know it, as, by having seen the reverse with his own eyes, or by having satisfied himself by evidence that is equivalent to ocular demonstration that the thing is false, and yet he may believe that it is not true. Now, if a man makes a statement, believing that it is not true, although not absolutely knowing that it is not true, that is still a personal falsehood, and is a falsehood within the meaning of this issue, because it plainly implies dishonesty in the person who makes the statement. But, still further, the person making the statement may not be in the condition I have just described of believing the statement to be untrue, and yet he may be in this condition, that he does not believe it to be true, for there is a material distinction between these two things. Now, when you come to that case—of a party making a statement, who does not actually believe it to be

true—that is a mere negative state of mind, you will observe ; and it will depend then upon the relation of the party making the statement to the fact which he states, and to the person to whom his statement is addressed, whether it is dishonest in him, in these circumstances, to make the statement or not.’ And this depends, he goes on to say, on whether the statement is made upon an indifferent subject, or whether it is made by a person in a position having access to peculiar knowledge on the subject. An untrue statement rashly made by such a person, and made for the direct purpose of deceiving another, would be false and fraudulent. ‘To apply these principles to the present case : If the directors of this bank have made a statement which is contrary to the fact, and a material and important statement which is contrary to the fact, and if they had full means of informing themselves upon the subject, but turned their backs upon the light and would not see, and yet made this statement, false in itself, without any honest belief on their part that it was true, then that statement so made by them is false, within the meaning of this issue. But then the statement must not only be false, but, you will observe, there is another epithet bestowed upon it in this issue which is also full of meaning. It must be fraudulent ; and, in judging of whether it is fraudulent or not, you will undoubtedly derive a great deal of help from the consideration whether it is false or not—false in the sense that I have now explained. But still, even though false in itself, in order to satisfy this issue, it must be made for the purpose of deceit—be made with the view of deceiving the party to whom it is addressed. By that I don’t mean the purpose of deceiving the pursuer of this action—that is not the thing—but the purpose of deceiving the persons to whom immediately the statement was addressed ; the effect of it being to deceive the pursuer, who received the statement through them.’

In the case of *Cullen v. Johnston, etc.*—a case proceeding on nearly the same grounds as the last, and arising out of the same company—there were some principles settled in the question of relevancy before the House of Lords, which are important as bearing upon the relative position of the officials in a public company. The Court of Session had held the action irrelevant as laid against the manager and secretary, although it was alleged generally that they had been participant in framing the so-called fraudulent reports, on the ground that the manager and secretary were under the direction and control of the directors ; and that their duties with regard to

the reports was only to provide the information from the records of the establishment upon which the directors should proceed in framing them. It was held in the House of Lords, that the directors and managers do not stand in the relative position of master and servant. 'The directors and managers,' says the Lord Chancellor, 'are officers, and all in a legal sense are servants of the company, that is, of the shareholders; but their respective positions and duties are clearly defined by the contract of partnership. It is true that the business is to be carried on under the superintendence and control of the directors; but it is obvious that, in a joint stock banking company, the officers on whose judgment, skill, integrity, and exertions the success of the undertaking would mainly depend, must be the managers.' But, even assuming that the managers are properly to be regarded as servants of the directors, it was held that if, as alleged, they concurred with their masters in the commission of a fraud, they must be treated as principals.¹ The action was accordingly held relevant against all the defenders, and the case went to trial upon an issue of false and fraudulent representation similar to that in the previous case of *Dobbie*. The trial came on last spring vacation, under the direction of the Lord President; and perhaps a few extracts from his clear and forcible directions at the trial will be the most fitting conclusion to this comment upon the responsibilities of the various parties in a joint stock company. It must be remembered that the action was at the instance of a single shareholder, and that the ground of action was false and fraudulent representations. 'Gentlemen,' says the learned judge, 'you are to deal with the case in question of whether these defenders, or any of them, made false statements—that is, statements which they had no reason to believe were true, and made them fraudulently—that is, with an intention to deceive, and for a fraudulent purpose. It is clearly necessary for the pursuer to prove not only falsehood, but fraud, in the mind of the party making the statement. Fraud is not to be presumed in doubtful cases, but fraud may be established by clear and conclusive evidence; and if that evidence exists, the party who has committed the fraud must be responsible. Thus, in considering whether A is guilty of fraud or not, you are entitled to look into the whole course of his conduct with regard to the management of the bank.' 'If the directors of a joint stock company combine to defraud the shareholders and the public by getting

¹ H. of L., July 1862, 4 M'Queen, p. 424.

them to purchase that which those combining wish to sell at a high price to the possible purchasers, or if they are guilty of fraud of any other kind against the shareholders, such as attending to their own interests or their friends', let them be exposed and denounced; because it is desirable that no such persons should be in connection with banks or other public establishments. On the other hand, if persons who have used their best endeavours—who have acted, probably on an erroneous judgment, but honestly, in the discharge of their duties, are to run the risk of being dealt with as fraudulent, no honest man would be a director, because no honest man would risk his character if such an inference were to be deduced from mere error or mismanagement.'

R. C.

THE PATENT QUESTION UNDER FREE TRADE.¹

In treating of the Patent Question, we are called to consider the principles on which inventors ought to be rewarded or encouraged, the actual state of patent legislation, and the movements now afoot for bringing legislation into conformity with those principles. Without any formal division, these branches of this great subject will severally come under notice in the following notes.

The principles on which inventors ought to be dealt with will be best understood by obtaining a clear view of the rights and services of inventors. With regard to these there prevails much misapprehension. Spurious sentiment is too frequently allowed to cloud the judgment of parties who seek to reform our patent legislation.

What, then, are the *inventor's rights*?

Unquestionably, the inventor has the right to use *his own invention*. It is a serious objection to patent laws, that unless he be the first to patent, he may lose this right. Quite commonly an invention suggests itself to a number of persons about the same time. In

¹ This paper is an abstract of a most able and interesting memoir on the subject by Mr R. A. Macfie of Liverpool, a gentleman whose labours have contributed in no slight degree to the elucidation of the important questions involved in the consideration of the patent laws. The paper of Mr Hawes (which, as well as that which we have abridged, was read before the Social Science Association at their Edinburgh meeting) has been published in the *Law Magazine*. Mr Macfie's paper has been published by himself, with an appendix of extracts from the published opinions of many of the most enlightened thinkers in England and the Continent on this subject. Before our next period of publication, the Report of the Royal Commission on the subject will in all probability have been issued, when we shall avail ourselves of the opportunity of making some further observations on the subject.

such a case, all but the one who is the first to use and patent are deprived of the advantage of the improvement, though it is as much their as his original device.

Further, the inventor has the right to *conceal his invention*. As to the propriety of doing so, he must himself judge.

The inventor has no other natural right.

On the other side, what right affecting the invention has the State? None. It cannot claim participation in, nor revelation of, the inventor's secret.

Yet has the State a duty. While protecting the inventor in the free exercise of his right of use, it should, on the other hand, maintain the natural right of all its citizens to do whatever they please, provided nobody is wronged, and particularly to carry on their trades with their own machines, and in their own ways.

Here arise the questions—Does public use of an invention discovered by an individual do him a wrong? Are forms, combinations, processes, that he has introduced, his exclusively? We have already virtually answered in the negative. Hence, for the State to allow the inventor an exclusive privilege or right, is to limit or trespass on the rights of others.

Statute law institutes in favour of inventors exclusive privileges, which become, or are called, their rights; but in doing so, it preserves the principle of the right of the public, since, at the end of the period for which it grants these privileges, they cease. If they were natural rights of property, lapse of time would not make them null; and inventions could not become public property without positive enactment.

The privileges which statute law, rightly or wrongly, creates, are not granted in consequence of acknowledged or claimed right of property; nor are they the price whereby the State purchases from an inventor a right of property. They are the reward (or, be it the price) whereby it induces him to reveal his secret, and introduce his invention into use. The latter part of the contract—the introducing into use—is a condition too frequently neglected, perhaps now altogether lost sight of, and no longer insisted on either by courts or legislators in the United Kingdom.

We may now, in order to clear away what has been to some a stumbling-block—the argument from analogy founded on the case of literary property—notice certain distinctions between the subjects respectively of Patent Right and Copyright. Those things that

belong to the province of patent right are in their nature capable of being independently discovered or originated, in the same identical form, by a plurality of persons. Of this character are the principles of mechanism, processes of manufacture, and forms or methods accordant thereto. Such, indeed, are, as a rule, actually discovered or invented by several persons, and this very often almost simultaneously. It is otherwise with things that belong to the province of copyright—literary and artistic combinations, books, pictures, musical compositions, involving any degree of elaboration. Such, at no interval of time, have ever been produced by even one other person except a copyist.

This ground for differential treatment is connected with others. In particular, the literary or artistic compositions of any person are perfectly distinguishable from all those of every other. Hence the copyright privilege is conceded in the absolute certainty that the grantee is their true and only originator, or first producer or creator. No second person can come forward, after the copyright privilege is secured to an author or artist, and allege that the poem or picture was composed by him also. To infringe copyright, means to copy slavishly or meanly the work of another. To constitute infringement, it is not sufficient that the second person's book has the same subject, and the same purpose in view, and is written in the same spirit as the first; the 'matter' must be the same, and in the same form. And so with pictures, the subjects may be the same; the ideas may show great correspondence. *Exactness* of 'matter' and of arrangement is everything. Patent right, on the contrary, may be infringed where there is no such exactness, and no copying whatever, but complete originality. Disregarding form, it forbids the embodiment and use of *ideas*, even of ideas entirely one's own.

We have thus the inconsistency, or paradox, that the exclusive privileges which have for their province only material objects—which engage only our bodily frame, and those senses merely that have their exercise on matter apart from mind (and this is all that patentable inventions do)—carry prohibition into the region of ideas; while those other exclusive privileges, in whose province matter serves only as a vehicle or excitant of things immaterial—conceptions, memories, tastes, emotions—and as an instrument to set the mind a-working and affect the higher senses and faculties—make no such incursions, keeping entirely clear of interference with any man's practical use of ideas.

Literary and artistic copyright has for its province visible, tangible works, intended only for the eye, or the ear, or inner man through the eye—objects to be looked upon, listened to, thought of; not things to be worked with or employed, nor things consumable, nor mere modes of doing a thing, like the subjects of patent right. It has no regard to processes, operations, implements. Therefore, unlike patent right, it interferes not with manufacturers, artisans, miners, farmers, shipping. Its sphere is in finished productions, works of art in their completed state—objects that are permanent and unmistakeable. Infringements, therefore, are necessarily both manifest and of set purpose, whereas infringements of patent right are often doubtful, even when the subjects or results can be exhibited, and when the facts of the case are assented to by all parties; and if it is a question of processes, its infringements are often undetectable after the fleeting moment during which they are alleged to have taken place. Further, as before said, contraventions of patent right may be, and not unfrequently are, done unconsciously or unwittingly.

The foregoing distinctions do not lose force when viewed in connection with another class of objects for which privileges (happily shortlived) have been recently introduced—viz., designs and patterns. These occupy a borderland. They belong to the province of copyright, but traverse the province of patent right, directly interfering, like it, with certain manufacturers' freedom of production—much as letterpress printers, engravers, etc., are affected by the other copyrights.

The law recognises the existence of some distinction within the province of patent right, and sanctions part of the above conclusions, by refusing to give patents for *principles*, though, indeed, it weakens the refusal by allowing the discoverer of any one mode of working out a principle to claim every other mode.

Some one may ask—How, then, is the discoverer or inventor, who is the possessor of knowledge in the useful arts that others possess not, to make it profitable to himself?

We have already pronounced that he may employ this knowledge himself—he may use it in his business. He may also communicate it to others for a consideration—that is, sell it.

For this latter employment of his knowledge there must be specific contract or promise: for selling there must be a buyer; for tuition, a pupil; with an agreement as to terms in either case.

It is not the intention of this paper to plead for easy terms. Its

object is to exhibit and to plead for justice, which is tantamount to contending for restitution of lost public rights, and the emancipation of industry. Yet what the inventor is called on to relinquish is not national reward or national *liberality*—this let him still enjoy—but rather the *form* in which it is now extended—that is, monopoly, or exclusive privileges, and the power to favour some by granting licences, and to injure all by refusing or charging too high for licences. Monopoly in a great country and an extensive trade is a privilege that, bad and antiquated as it is, would be still more offensive and absurd but for the accompanying privilege of licensing. The profit reaped from it is greatest when and where that end has been attained—that is, in those circumstances where a stimulus is wanted least, and when and where its obstructiveness is most felt. Its productiveness is least where the inventor's originality and merit are greatest.

Notwithstanding the comparative inutility of the published specifications under the existing system, when the object of the patentee is not to give information, but to make his description as vague and as comprehensive as the law will allow him to do, we are disposed to think that much advantage would be derived from the publication of inventions under a system which would induce the patentees fairly to disclose their discoveries.

No estimate of the advantage to be expected from specifications in future can be formed on the basis of present experience; for now the publications of the Patent Office (which are, indeed, highly creditable to the department) are, to a great extent, registers and notices of restrictions—of inventions that people may not use; whereas, in the good time coming, they will convey benefits for the free use of all. They will then be received with pleasure, be read with avidity, and prove immeasurably more useful.

It must surely be a great advantage to have new discoveries and plans, as soon as they are made, carefully described by the parties who alone can communicate them. This benefit a patent system confers, besides assuring to manufacturers exemption from the secret and inquisitorial espionage to which all would be exposed if there were no patent system, and to which not a few might be tempted to degrade themselves by resorting. A right system, therefore, is worth not a little as a means of preserving the honour and mutual confidence of manufacturers.

The expediency, therefore, may be assumed of some means to stimulate the publishing or specifying of inventions.

Having this object in view, is it for the public interest—is it, on the whole, wise and fair—to substitute for monopoly privileges, as the stimulus and reward of inventors, *grants of money*?

To answer this question, let us consider how the change would affect the inventors and the public.

As to *inventors*—would they be more stimulated to invent and to publish by the one than by the other form of reward?

A money grant is more honourable and more agreeable to the feelings of the recipient. Though at first sight it may wear a more mercenary appearance, it really recommends itself to generous minds by superior attractions. It implies selection from claims that are worthless, and therefore confers honour. To be registered by one's own act alone among thousands of mere claimants (and this is substantially what to take out a patent amounts to), is scarcely so creditable as mere entry for a competitive examination; for entry at least evidences emulation, aspiration, readiness to undergo a testing trial.

At first, indeed, there is between the two kinds of grant but little external difference. The inventor, either way, is, up to a certain point, as yet only submitting his claims—at best, entering the lists. But from the moment the grant of money is made, he is distinguished. What he receives is a *honorarium*, a recognition and reward of merit.

And there is superadded the powerful incentive of graduation—increased reward and honour according to degrees of merit. This is more than a mere stimulus: it satisfies the craving after justice, which notoriously the monopoly system fails to do.

Besides, the reward, when deserved, is prompt and is sure; the bird is in hand. Working men, being without capital, connections, and influence—and, indeed, most others *with* these advantages—would in general greatly prefer the certainty of a moderate sum of money, payable at once, to the prospect (or, rather, the chance) of a much larger sum after the lapse of years, especially as it is attained without the toil and trouble, without the negotiations, labours, and hazards, of actually engaging in business transactions.

And it is subject to no deductions. The inventor will no longer frequently require to transfer his patent, or to promise away the greatest part of its fruits, to others, who leave him nothing but the bones to pick—sometimes only the emptied shells.

In all these respects a monopoly privilege contrasts very unfavourably. To obtain it is no honour. It makes no distinction. It involves labours, anxieties, delays, disappointments.

True it is, that, though the majority of patents may be pecuniary failures, many patents are successful in extracting from the public large sums of money; but it does not follow that even these are profitable, for there is a debit side of the account, which shows heavy *per contras* of commissions, travelling, litigation, and other expenses, besides neglect of the patentee's more legitimate affairs.

And of the few that bring in the princely revenues of which we have heard, how small a proportion is held by the actual inventors—how large a proportion has passed into other hands! Certainly, that quota only of the drawings which the actual inventors receive, is the measure of the efficacy possessed by the patent system as a stimulus.

We have already touched on the advantage of money grants to working men who are inventors, and have thence anticipated for such a system popular favour. We now view the present system as it affects working men who are not inventors. The objects for which an operative engages himself are twofold: to earn wages, and to acquire knowledge and skill; these latter being a valuable power—or, so to speak, capital—available as a legitimate and generally understood means of promoting his advancement. Patent restrictions prevent him from making his knowledge profitable, and limit his opportunities of turning his skill to account. If it were not for the obstacle that patent laws interpose, working men would have their wages advanced by masters naturally unwilling to lose these depositories of their secrets; and higher wages would be proffered by other applicants for the services of men who would indeed to them be 'treasures.'

We now proceed to consider how *the public*—the users of inventions, and the millions who profit by or enjoy the benefit of improvements—will be affected by the substitution of money payments by the State for monopoly.

Before stating the conclusions that may be legitimately formed on this main branch of the subject, let the identity be remembered that exists between the interests of the whole public and those of manufacturers individually. If monopolies make articles dear, it is the public that pays the enhanced cost; if bad, it is the public that suffers from their inferiority. Still, manufacturers and operatives are peculiarly and more directly affected. If a patentee makes

charges that are unequal, theirs is the hardship. If he makes charges so high as to cause export trade or home consumption to dwindle or disappear, theirs is the loss of employment and profit that ensues.

Our conclusions then are:—

1. The stimulus of money grants, judiciously distributed, will induce the making, and especially the publishing, of many inventions now lost or never made. At the least, the stimulus will be adequate to accomplish this end of a patent system satisfactorily. As to encouraging the introduction of new trades, that end is no longer dependent on monopoly privileges.

2. The hindrance which monopoly presents to the perfecting of inventions by other persons, and to the combining of improvements, will happily be removed, and with it a radical and serious defect and mischief of the present system.

3. The use of inventions will be enjoyed many years sooner; and the acceleration will not only be a great boon to society, but will emancipate trade from trammels and difficulties that interfere (and that at the critical period when new businesses are being introduced or old ones recast) with its success, particularly in competing with foreign rivals, who may be unencumbered and unburdened with patent restrictions and payments. Exemption from these, in frequent instances, is as good as a handsome profit.

4. There will not merely be earlier liberty to employ and earlier actual employment of the inventions, but the cost to the country will be much less. This follows from what has already been written regarding the sums—so small compared with what is exacted from manufacturers under the present system—that would satisfy inventors under a better system; and regarding the small proportion of what is exacted now that reaches them. By the new system they will probably nett more than under the old. Where the case is otherwise, the disparity may arise less from inadequate remuneration in future, than from the excessive sums which by the present system are scattered, not merely lavishly, but blindly, indiscriminately, and fruitlessly.

Though not strictly in place, let us observe, that if the exceptional cases of fortune-making were the lot of the most deserving inventors,—of those who have the greatest claims, either because of the singular merit of their improvements, or because of the length of time and heavy expenditure devoted to the development of these,—the present

system would at least have one bad feature less ; but notoriously there is no connection between the value of inventions and the magnitude of the sums they yield their possessors. The most worthless in point of conception and preparatory labours may, and, indeed, frequently do, yield a large return, when those of the greatest merit yield little. To give the means of extracting from the public an enormous fortune for the fortuitous discovery of something that somebody else would probably fall upon only a little later, can go but a very short way to stimulate invention.

We proceed to consider the questions, whether uniformity of legislation in the different countries on the subject of inventions would be useful ; and whether the union of the several countries is the best means for obtaining thorough and satisfactory reform.

No argument is needed to prove that the former of these two questions must be answered in the affirmative ; and we certainly think not many observations are wanted to justify and fortify an affirmative answer to the latter also.

How inconvenient and hurtful, to inventors and to the public, is the diversity of laws now prevailing ! How great a facility to inventors, if a patent registered in one country were recognised in all others ; and to both inventors and manufacturers, if a specification published in one were made officially known in all. Great as would be the advantage of uniformity and union between the countries that now grant patents, the comprehension in a 'Patent Verein' of those that now grant none will be hardly less advantageous. The former countries are virtually paying for inventions which the latter now may use equally, but always without paying. Without such a comprehension, free trade is an incongruity, an injustice tolerated only on account of free trade's great benefits.

Here comes into view a consideration that deserves great attention. To make patents valid in all countries, or even in several countries, renders monopoly no longer tenable. No inventor could manage properly a business so vast as would be necessitated.

Let us suppose a case. A British engineer invents a new governor for a steam-engine, and patents it in the United Kingdom. He must, in order to make his patent profitable and publicly useful, be ready to sell the right to make such a piece of mechanism to all his fellow-engineers, and the right to use it to all persons who work steam-engines, in town or country, on land or sea. Is not this an amount of work that few can face ? Would it be possible for any

one engaged in trade, even though he employs agents throughout the kingdom, to conduct the mere correspondence that would ensue, to do the management of the patent justice? How will the difficulty be increased if patent privileges are obtained for all civilised States! Besides possessing the ubiquity already elsewhere spoken of, he should be a universal linguist, and be possessed of the capital of more than a millionaire. Our illustration is founded on the case of a piece of machinery, a thing that cannot be concealed: conceive what would be the labour, if, instead of that, the patent was for an obscure process, to prove contravention of which would need, in every case, a long course of observation and evidence, and a multitude of witnesses. You cannot, therefore, maintain inventors' privileges if patents are to have universal validity. But the result we have supposed is nearly what actually takes place now, wherever there is vigilance and capital enough to secure patents in all or several of the countries that grant them—a combination, we admit, not usual. And it is no satisfaction to tell us that to such extent as foreign patents are taken (and to some considerable extent even under the British patent), the impossibility of working privileges over a wide area leads to the *sale* of the rights. This is, indeed, a mortifying aggravation of the hardship of the case, so far as the public in the several countries are concerned; for it implies that others than the inventor carry off most of the spoil—that we are sorely damaging ourselves for non-inventors and foreigners, without compensating gain. We suspect, too, that such sales are made for but a small consideration.

We have noticed that our present system leaves an inventor free to take a patent or not, yet compels the State to buy the secret of any person who wishes to sell. Nobody would think this a great hardship, if the conditions usual in compulsory purchases were observed—viz., that the price should be paid in money, and its amount be determined by a competent valuator acting for mutual behoof.

The very opposite is, unfortunately, the mode of selling to the State an invention. The State, we have seen, pays not in money, but in monopoly. The transaction is an unequal—a preposterous barter. The State buys the secret for behoof of the world, and in return gives away for fourteen years its resident subjects' title to do the thing specified, besides investing the inventor with power to levy on all resident users during that term an arbitrary tax. The word 'tax' best expresses what is meant by the gentler words 'licence,'

'fee,' and 'royalty.' But such a tax is worse than taxes levied by government in several respects : it has no limit—it is not levied equally—it is not remitted when there are no profits and means wherefrom to pay.

To invest inventors with, and to subject trade to such despotic powers, is a most extraordinary anomaly, not commonly regarded as foolish only because it is familiar. It is utterly inconsistent with the original design of patents, which we have seen was the *promotion* of trade and manufactures. If the privileges and licences now applied only to new trades or new branches of trade, philosophers and statesmen might denounce them as unconstitutional or not allowed by sound political economy ; but manufacturers could not complain, as now they do, that in businesses already established, flourishing, and progressive, they are harassed and hindered by burdens, restraints, and prohibitions, that act as penalties imposed by the nation on those it ought to defend, and as premiums to their rivals. These complaints arise from the fact that inventions now-a-days are, in general, intrusions on ground already occupied, being for processes and machines to be used in manufactures long ago established ; and they are aggravated by the great extent and perfection of modern manufactures, and by the world-wide competition which, under free trade and improved means of transport, manufacturers must face.

Are manufacturers, then, opposed to inventions ? Are the opponents of patent monopolies inimical to inventors ? Not at all. It must be confessed that patentees and patents are viewed with indifference at least—the latter certainly with some dislike. And why ? Because the present patent system is vicious—not in its intention, but in its form and effect. It is so constituted as to disserve interests that ought to be in harmony, if not altogether identical. Whatever stimulates discovery and improvement ought to be popular with manufacturers. The system is, *ipso facto*, condemned by being not so. To expose the system as it is—to be an opponent of monopoly as the form of reward, to object to letting patentees tax manufacturers, and that without limit or control, for the long period of fourteen years—is not to be an enemy of inventors.

It is impossible to measure the loss occasioned to manufacturers, and indirectly to the public, by the present system. Undoubtedly that loss is very great indeed, both in money and in impediments ; probably in the latter much more than in the former. No amount

of compensation to inventors which, under a right system, could be charged upon the revenue, would approach the amount which the present system costs. The present mode of remunerating is the most extravagant possible; and the worst of it is, that little, comparatively, reaches the inventor himself. His interests would be better consulted by such a reform as the following:—

Let exclusive privileges cease, or, by way of compromise, be granted for a period of not more than three years:

At such time as may be agreed on, let each inventor be allowed to have his invention reported on and estimated; and

Thereupon let the nation pay the valuation price or *honorarium*.

Of course, the estimation must have regard, not to the amount of money that *monopoly* might enable a patentee to extract from users, but to what is fair, considering utility, cost of preliminary trials, originality, probability of others making the same discovery, etc.

There is a yet simpler mode, though not so satisfactory or radical as a remedy for present evils, namely, to allow the inventor's privilege (coupled, however, with an obligation to grant, from the first, licences to all persons willing to pay a fair consideration) to run on until the State, or its manufacturers, demand that an estimation be made, and to allow the State, or its manufacturers, then to pay the sum awarded, the privilege thereupon to cease.

The several payments up to that time made by licences should, in this case, be reckoned as part payment or contributions towards the sum requisite for procuring extinction of the patent.

Such modifications of the patent system would more or less effectually remove the greatest evils that are now just matter of complaint on the part of the public, viz.:—

The patentee's right to refuse licences to persons engaged in the business which his invention affects, and their exclusion from its use, either through refusal or excessive demands:

Obstacles that prevent the combined use of successive improvements patented by different inventors:

The disproportion that is so common now between the merit or value of an invention, and the rate and amount of the patentee's fees; between the services rendered and the reward enjoyed:

The want of any limit to the sum which a patentee is now entitled to exact for the use of his invention:

It is impossible to form any precise estimate of the amount of money that will be annually required for recompenses, when these

shall be introduced, as the writer believes they ought to be. It is probable that a very moderate sum will suffice. Still, the nation would not grudge a liberal provision. We may hope that on the average of years it would fall short of L.100,000. Yet the large sum of L.200,000 might wisely be placed at the disposal of the distributors. To prevent the too free handling of the public moneys, it may be stipulated that the awards shall be payable at a certain time each year, and shall be subject to a deduction, equally distributed throughout, in case the total shall exceed the above large yearly appropriation.

It is not apprehended that there will be any insuperable difficulty in constituting a court or commission, to whom should be referred the valuation of inventions. The inventors themselves might safely be allowed the nomination of the court or commission, provided there were a limitation assigned beyond which their united recompenses should not go. We adhere to the conviction that, under a good system, wherein, besides the three years' start being secured, the element of honour shall be judiciously prominent, sums will satisfy inventors which, though fair and even handsome, will not compare in burdensomeness with the cost—heavy, though unseen—which the nation is now forced to bear in connection with most serious deprivation and damage.

LAW REFORMS OF THE SESSION.

AMONG the measures of law reform which are to be the subject of consideration in the present session, we regret to say that there is no prospect of a new Procedure Bill for the Court of Session. The reasons for the postponement of the measure are so evident, that the result has for some time been taken for granted, alike by the friends of reform and by the advocates of the existing procedure and practice. It is obvious that to secure the passage of such a measure through Parliament, one of two conditions are requisite; either the bill must be strongly supported by professional opinion, or it must be introduced into Parliament so early as to admit of its being forced through the usual stages in spite of interested opposition. In the present session, the Government, if they had brought in a bill, would have had to face the twofold disadvantage of want of time and want

of support. The bill of last session having been withdrawn for the purpose of affording the professional bodies an opportunity of considering and reporting upon it, it was due to these bodies that no active step should be taken until they were prepared to give expression to their views upon it. It must be presumed that the gentlemen to whom was entrusted the duty of preparing reports, have discharged it most industriously, as their sittings have in each case extended over a period of from eight to twelve months. This lengthened period of deliberation has, doubtless, borne valuable fruit. Reports prepared with such care will have a permanent value as records of the deliberately expressed opinions of the societies by which they are issued. Unfortunately the best part of the parliamentary session for business has been allowed to pass before the reports were issued, and it is abundantly clear that a bill cannot now be introduced with a reasonable prospect of having it passed into law. This being so, it is better that the subject should be allowed to lie over for another year, by which time the practising members of the profession will have settled the question whether the ruin of the business of our superior courts is not too high a price to pay for adherence to conservative principles, in so unimportant a matter as the forms of legal procedure.

We have no intention at present of entering upon so wide a field as the examination and criticism of the professional reports on the Court of Session Bill. One sentiment characterizes all of them in a very marked manner,—a feeling of hostility to change in matters of form and nomenclature. It might be supposed that new modes of transacting business would necessitate the introduction of new terms. But such is not the opinion of those who represent professional opinion in Edinburgh. ‘Condescendence,’ ‘defences,’ ‘issues,’ and ‘pleas in law,’ are terms dear to the heart of the Edinburgh lawyer; and if these are retained, though but as the shadows of their former selves, he will forgive a great deal of innovation of a more substantial sort, but his susceptibilities are strongly roused by anything approaching to an importation of English phraseology.

We confess that, to our thinking, the terminology question is one of the smallest that can claim the attention of the legal reformer. At least it is by much too small to fight about. The question of the form of summons, and the like, although involving considerations of greater moment, is one that may and ought to be settled in conformity with professional opinion. Indeed, we are not sure that the Court of

Session summons, divested of the will and other surplusage, is not a more artistic as well as a more convenient document than a Chancery bill. The writ of the English Common Law Courts is well enough, but it is only adapted to the institution of money actions; and these, as every one knows, form but a moderate proportion of the cases occurring in Court of Session practice. The weak points of our procedure are, (1) the method of pleading, and (2) the method of investigation of facts. A bill which would enforce brevity and method in pleading, and provide for the taking of evidence by the judge who is to dispose of the case, would, we are persuaded, restore the waning popularity of the Court of Session. No consolidation of enactments, and no amendments which should leave these evils unredressed, can be of any lasting utility.

We are in a position to state that the subject of Court of Session reform is not abandoned by the Government, although legislation on the subject is deferred in consequence of the advanced period of the parliamentary session at which the Lord Advocate was enabled to deal with it. A bill will in all probability be introduced early in the next session, which, without receding from the principles of the amended bill of last year, will aim at carrying them into effect with as little alteration as possible on received forms of process and legal phraseology. In the meantime there can be little doubt that professional opinion is setting in more strongly than before in favour of a thorough revision of the whole system of Court of Session procedure; and we are very hopeful that the next bill will meet with such support, both in and out of the profession, as is necessary to facilitate the passage of such a measure through Parliament.

Next to the administration of justice in the supreme courts, the improvement of the system of registration of land rights is assuredly one of the most important legal reforms which can engage the attention of the Legislature. The bill which has been introduced under the auspices of the Lord Advocate is, on the whole, a satisfactory measure. Without attempting to deal with all the topics suggested by the very instructive Report of the Royal Commission, this bill provides for the removal of the chief defect of the existing system of registration—the double establishment of registers. Whether the consolidated registers should be kept in Edinburgh or in the district, is a question in which the local registrars and the local practitioners are more materially interested than the public, who will be equally pleased to be spared the expense of a double search, in whatever way

the change is accomplished. While we have no hesitation in expressing our approval of the bill as a whole, we must again observe that the division of large cities into two districts—one of them falling within the department of the General Register Office at Edinburgh, the other kept by a local registrar—is an inconvenient arrangement. We have never been able to understand the reason for excepting burgh registers from the general arrangements by which all district registers were to be transferred to Edinburgh. But if the local registers of burgh subjects are to be retained, it would be better to throw in the extra-burghal part of the city, so that local practitioners may not be put to the inconvenience of having to deal with two sets of officials residing in different localities. Without committing ourselves entirely to the views of the Glasgow practitioners on this point, we submit that, if such registers as that of the regality of Glasgow are to be removed to Edinburgh, the burgh register ought also to be removed, so that the advantages of concentration may as far as possible compensate the other inconveniences of which the profession in Glasgow have cause to complain.

The Summary Procedure Bill has passed the House of Commons, and will in all probability be carried through its remaining stages without opposition. Being essentially and consistently permissive in all its provisions, no one has any interest to object to it, because no one is obliged to make use of it. The chief value of an Act providing for the recovery of penalties, consists in its applicability to future legislation. At present there is no legislative code of practice in this quasi-criminal department of the law, and penalties under many statutes are practically irrecoverable. This difficulty will in future be obviated by the incorporation of the clauses of the Summary Procedure Act for the purpose of enforcing the sanctions attached to the contravention of statutory provisions.

In another page our readers will find a reprint of the Lord Advocate's Trust Administration Bill, which has for its object the enlargement of the powers of trustees in relation to the investment and transfer of funds under their care, the limitation of the liability of trustees to the beneficiaries under the trust, and the improvement of the machinery by which the Court of Session exercises its jurisdiction over trusts. Some of the provisions of the bill are apparently borrowed from recent English statutes promoted by noble lords who have occupied the woolsack. Others are more especially adapted to the peculiarities of our own law. We venture to anti-

cipate for this bill a favourable reception from members of the profession conversant with equity practice.

New Books.

A Treatise on the Law of Reparation. By JOHN GUTHRIE SMITH, Advocate. Edinburgh: T. and T. Clark.

THE former publications of Mr Smith led us to form the most favourable expectations regarding his work, which has for some time been announced, and which is now published, on the Law of Reparation. The treatise is, to a considerable extent, as we understand, the product of the author's leisure hours, during the time when he held the office of Sheriff-Substitute at Forfar. It is evidently prepared with great care, and evinces a thorough acquaintance with the rules of law, and a clear perception of the principles which regulate the important subject of damages for wrongs and breach of contracts. We do not doubt that it will at once take its place as a standard work of reference in every lawyer's library, and we venture to say that few works will be so extensively consulted.

The subjects illustrated by Mr Smith embrace every description of legal right, the violation of which may give rise to a demand for reparation. After some introductory observations as to the parties entitled to damages, and those who are liable to be sued, the author advances to the consideration of the class of actions of damages of most frequent occurrence—damages for personal injuries. From this he passes by a natural transition to the doctrine of negligence; an intricate subject, but one which Mr Smith's qualifications as a jurist enable him to handle with complete success. This part of the subject is succeeded by separate chapters on the law of defamation, wrongous imprisonment or conviction, injuries to property, and responsibility of innkeepers and shipmasters. Lastly, there are two excellent chapters upon fraud and the measure of damages.

Although quotation from law books is like producing a brick as a sample of a house, we are tempted to transcribe the following judicious observations from the commencement of the last chapter:—

'Assuming that a wrong has been done, the further question remains, What sum is the innocent party entitled to receive as compensation? To the popular

mind, it may appear that the inquiry ought rather to be, What is the sum which, in the circumstances, the wrong-doer *deserves* to be made to pay? And from the verdicts sometimes returned, it would seem that such is the form in which the subject is not unfrequently regarded. But a moment's reflection will show that this is a complete misapprehension of the nature of an action of damages, which is not to obtain the punishment of the wrong-doer, but to compel him to make good the loss which the other party has actually suffered. It is quite true, that wherever the claim comprehends *solatium* for wounded feelings, as well as compensation for the actual loss,—that is to say, where the ground of action is injury to the person, liberty, or reputation; or fraud, malice, or oppression enters as an ingredient into the case,—the sum to be awarded in name of damages must always be more or less a speculative question, on which different men will come to very opposite conclusions. In such cases the jury are not expected to weigh in golden scales the precise sum which ought in justice to be given. Of the matter of *solatium* they have necessarily the entire control; and all that they can be told is, to bear in mind that damages are given, not for the purpose of gratifying private resentment, or of making a public example of the delinquent, but of restoring the person injured, as far as money can, to the position he would have occupied had the wrong never occurred. . . . But in estimating the compensation for the actual loss to which a person may be entitled in respect of negligence, abuse of process, breach of contract, or any other form of wrong unaccompanied by fraud, there is not the same necessity for leaving so large a latitude to the jury. Here the defender is charged with the loss of which he has been the cause,—that is to say, was the direct, immediate, and necessary cause,—to the exclusion of every other circumstance.' . . .

These principles seem to lead to the following propositions:—

1. That the person who is innocent is entitled to receive from him who is to blame, compensation for all the damage for which he is to blame.
2. That as every person is held to have in view the probable consequences of his own acts, at the time of doing them, he is to blame for all the results which he either did foresee, or might have foreseen, as the consequences thereof.
3. That, when the contract is silent on the subject, he cannot be held to have foreseen the results, which were only indirectly attributable to the act for which he is responsible.
4. That, therefore, he is only answerable for the damage, of which his act was the direct, certain, exclusive, and necessary cause.

Mr Smith has the merit, not very common among lawyers, of being able to give a succinct and at the same time a clear statement of the propositions he intends to illustrate. Nothing is slurred over, or left involved in ambiguity, because the writer has not had time to examine and make up his mind on the subject. His references to authorities are evidently meant for use and not merely for show; and, so far as we can judge, they will be found to be well selected and to he point. We could have wished that Mr Smith had been less

sparing in his citations of English authorities, which, as the work stands, are somewhat meagre. It is not necessary to copy in all the decisions from Addison on Wrongs; but without attempting to incorporate the general body of *nisi prius* law, a condensed statement of the leading cases in the form introduced by Professor Bell in his Commentaries might have been attempted, and would certainly have enhanced the value of the work. The omission, however, is of less consequence, as the standard English treatises on the subject are to be had at a price which places them within the reach of every reading member of the profession.

NEW BILLS BEFORE PARLIAMENT.

COURT OF JUSTICIARY (SCOTLAND) BILL.

A Bill to Provide for the Alteration of the Circuits of the Court of Justiciary in Scotland, and for holding additional Circuit Courts.

Whereas it is expedient to make provision for altering the circuits of the Court of Justiciary in Scotland, and for holding additional circuits: Be it enacted, etc.

1. It shall be lawful for Her Majesty in Council, from time to time as Her Majesty in Council may think fit, to alter the circuits of the Court of Justiciary in Scotland, or any of them, to form new circuits, to fix and determine the limits of each existing or new circuit, and the counties or portions of counties, cities or burghs, and districts, which shall be included within the same, to detach any county or portion of a county from any circuit, and to include the same in any other existing or new circuit, and also to fix and determine the times and places at which the circuit courts shall be held within each such circuit, and to alter such times and places, and to direct that any circuit court may cease to be held at any place where such court has hitherto been held, and may be held at any other place.

2. Every order to be made by Her Majesty in Council in pursuance of this Act shall be published in such manner as Her Majesty in Council may direct, and shall take effect from the date thereof, or from such other date as may be specified therein.

3. It shall be lawful for the Judges of the Court of Justiciary, and they are hereby required, from time to time, to make such orders and regulations, and to pass such acts of adjournal, as may be necessary for carrying into effect the provisions of this Act, and of any order to be made by Her Majesty in Council in pursuance thereof.

WRITS REGISTRATION (SCOTLAND) BILL.

A Bill to alter and amend the System of the Registration of Writs relative to Land in Scotland.

Whereas it is expedient to amend the system of registration of writs relating to lands and heritages in Scotland, to lessen the number of registers, and to facilitate searches thereof: Be it therefore enacted, etc.

1. This Act may be cited for all purposes as 'The Land Registers (Scotland) Act, 1864.'

2. The General Register of Sasines for Scotland shall be so kept that the writs applicable to each county shall be entered in a separate series of presentment

books, and minuted in a separate series of minute books, and engrossed in a separate series of register volumes; and where any writ shall contain land in more than one county, such writ shall be entered by the ingiver in the presentment book of each county, and shall be minuted in the minute book of each county to which such writ applies, and shall be engrossed at length in the division of the register applicable to one only of the said counties; and memorandum shall be entered in each division of the register applicable to the other county or counties to which such writ applies, and in the presentment book of which it is entered as aforesaid, setting forth the volume of the register and the folio or folios of such volume in which such engrossment is made, as such memorandum shall be deemed to be equivalent to full engrossment of such writ in the division of the register wherein such memorandum shall be entered as aforesaid; and for the purpose of this Act, the barony and regality of Glasgow, and also the stewartry of Kirkcudbright, shall each be treated as a county.

3. Provided always, that where any writ containing lands or heritages in more than one county shall not have been presented, minuted, and engrossed in all the divisions to which it applies of the register, the registration of such writ shall notwithstanding, as regards the county or counties in the division or divisions applicable to which it has been presented, minuted, and engrossed as aforesaid, be effectual, and it shall be competent afterwards to present, minute, and engross such writ in any other division of the register to which such writ applies; and such subsequent registration shall be effectual, as regards the county to which such other division of the register is applicable, of and from the date of such subsequent registration.

4. Registration of writs in the General Register of Sasines shall, except in so far as altered by the provisions of this Act, continue to be made in conformity with the practice heretofore in use; and no error or omission in any presentment book of the General Register of Sasines, to be kept as aforesaid, shall invalidate or in any way affect injuriously the registration of any writ recorded in said register.

5. Where any writ shall be transmitted by post for registration in the General Register of Sasines, the keeper of said register shall, upon the receipt of such writ, cause the same to be presented in terms of the instructions accompanying it by a clerk in his office to be appointed by him for that purpose; and such clerk shall attach to his signature in the presentment book the words 'transmitted by,' and thereafter the name of the sender; and such writ shall be recorded in the same manner as any other writ presented for registration, and on the writ being ready for delivery, intimation to that effect shall be made by post to the sender; and where two or more writs transmitted by post shall be received by the keeper at the same time, the entries thereof in the presentment book and minute book shall be of the same year, month, day, and hour, and such writs shall be deemed and taken to be presented and registered contemporaneously.

6. The whole Particular Registers of Sasines in Scotland shall be discontinued not later than the thirty-first day of December one thousand eight hundred and sixty-six; and it shall be competent to the Lord Clerk Register of Scotland from time to time, upon the application of the keeper of the General Register of Sasines, to order the discontinuance of any Particular Register of Sasines, and the Lord Clerk Register shall cause such order, signed by him, to be recorded in the General Register of Sasines, and a copy of such order, also signed by him, to be transmitted to the keeper of the Particular Register of Sasines to which it applies, and shall cause such order to be advertised in the *Edinburgh Gazette*, and in any newspaper or newspapers he may deem proper; and such order shall specify the day, not being less than one calendar month after the date of such publication in the *Edinburgh Gazette*, from and after which such Particular Register is to be discontinued; and after the date so to be specified in any such order as regards the Particular Register to which such order shall apply, and

after the said thirty-first day of December one thousand eight hundred and sixty-six, as regards all other Particular Registers, it shall not be competent to present, or for the keeper of said Particular Register to receive, any writ for registration therein; and all writs which, previous to the discontinuance of the said Particular Registers respectively, might competently have been presented for registration therein, shall, after said discontinuance, be registrable only in the General Register of Sasines; and registration in the General Register of Sasines shall have all the force and effect previously attached to registration in such Particular Registers of Sasines respectively.

7. Printed abridgments and printed indexes, both of persons and places, applicable to each county in Scotland, in the form heretofore in use in the General Register House, or in such other form as may from time to time be prescribed by the Lord Clerk Register, shall, from and after the discontinuance of all the Particular Registers of Sasines directed to be discontinued as aforesaid, be prepared under the superintendence of the keeper of the General Register of Sasines, and as nearly as possible contemporaneously with the minute books and volumes of the register, and such indexes shall be consolidated from time to time for such periods as may be deemed expedient: Provided always, that it shall be lawful at any time for the Lord Clerk Register, if he shall think fit, to direct that abridgments shall cease to be prepared separately from the minutes, and in that case the minutes shall be printed under the superintendence of the keeper of the General Register of Sasines, in lieu of printing such abridgments.

8. The keeper of the General Register of Sasines shall transmit the said printed abridgments, or printed minutes and indexes, from time to time as the same are prepared to the department of the Lord Clerk Register; and the Lord Clerk Register shall, at the end of each year, or as soon thereafter as the same shall be prepared and transmitted to his department, furnish to the sheriff clerk of each county a printed copy of the abridgments or minutes and indexes for such county applicable to such preceding year, and shall also furnish to each such sheriff clerk, as soon as prepared and transmitted to his department as aforesaid, a printed copy of each consolidated index applicable to such county; and such abridgments or minutes and indexes so furnished to the sheriff clerks shall be made patent by them to the public on payment of such reasonable fees as may be fixed by the Lord Clerk Register with the sanction of the Court of Session, which fees shall be accounted for by the sheriff clerks to the Lord Clerk Register as part of the fees of his department.

9. It shall not be necessary to register in the books of Council and Session for the purpose of preservation, or of preservation and execution, any deed competent to be registered in the General Register of Sasines, and which shall have been so registered, and such deed being registered in the said Register of Sasines, shall be held to be registered also in the books of Council and Session for preservation, or for preservation and execution, as the case may be; provided such deed, when presented for registration in the said Register of Sasines, shall have a warrant of registration written thereon, in, or as nearly as may be in, the form of schedule (A.) to this Act annexed, specifying that the deed is to be registered for preservation, or for preservation and execution, as well as for publication, and signed by the person in whose behalf the deed is presented, or his agent; and the deed, with such warrant, being so registered in the said Register of Sasines, shall not be re-delivered to the ingiver, but an extract only (containing, as part of said extract, where the deed is registered for execution, a warrant for execution) shall be delivered, which extract may be issued without abiding the actual booking in the register, and shall be in the form, as nearly as may be, of the schedule (B.) to this Act annexed; and the deeds themselves, after having been engrossed in the General Register of Sasines in terms of law, shall be periodically transmitted by the keeper of the said Register of Sasines to the Lord Clerk Register or his deputies, and shall be indexed, either separately or along with other trusts registered in the books of Council and Session,

as the Lord Clerk Register may direct; and such registration in the General Register of Sasines shall have all the legal effects of registration in the books of Council and Session for preservation, or for preservation and execution, as the case may be, as well as of registration in the General Register of Sasines; provided always, that no deed shall be held to be registered for the purpose of execution which does not contain a procuratory for registration, or clause of consent to registration, for the purpose of execution in the body of the deed; and such extracts as aforesaid, one or more, of all deeds so registered in the said Register of Sasines may be issued at any time by the keeper of the said Register of Sasines, or, after transmission as aforesaid, by the deputy keeper of the records, or by any one having their authority respectively; and all such extracts, and the warrants of execution therein contained, shall have all the like force and effect as any extract from the books of Council and Session, or as any warrant of execution contained in or appended to such extract, or as any extract from the General Register of Sasines, according to the existing law and practice; and such extracts, in terms of this Act, shall be equivalent to the registered deeds themselves, except where any deed so registered shall be offered to be improven.

10. No fees shall be chargeable at the office of the keeper of the Register of Deeds and Probative Writs and Protests in the books of Council and Session in respect of any deeds registered in the General Register of Sasines for preservation, or for preservation and execution, as well as for publication, in terms of this Act; and the fees to be charged in respect thereof, and of the extract given out at the time of registration at the office of the General Register of Sasines, shall be the same, with the addition only of any outlay for the writing and stamps of such extract as would have been chargeable if the deed had been registered for publication only.

11. The certificate of registration on every writ that shall be registered in the General Register of Sasines, and re-delivered to the ingiver, shall be signed by the keeper of said register, or a deputy duly commissioned by him to that effect; and no further signature in order to, or in token of, such registration shall be necessary to any writ presented for registration in the General Register of Sasines; but every such writ shall, in token of such registration, be impressed with an office seal or stamp, to be kept in the said General Register of Sasines.

12. Every conveyance, discharge, or other deed or instrument, which shall refer, as allowed by the thirty-fourth section of the Titles to Land (Scotland) Act, 1860, to a particular description contained in a prior conveyance, discharge, or other deed or instrument recorded in a Register of Sasines, shall specify the book or volume of such register, and the folio or folios of such book or volume in which such prior conveyance, discharge, or other deed or instrument is engrossed.

13. It shall be competent to any institute, heir of entail, trustee, or other person interested in any tailzie, to apply to the Court of Session for warrant to register such tailzie in the books of Council and Session for preservation, as well as in the Register of Tailzies for publication, where not previously so registered; and it shall be lawful for the Court, under such application, to cause such registration to be made at the expense of the applicant, or of the institute or heir of entail in possession, as the Court shall direct, and with a view to such registration, to order production of such tailzie, or grant diligence for its recovery.

14. The Register of Interruptions of Prescriptions shall be discontinued as a separate record, and all writs appropriate thereto may be presented and registered in the General Register of Sasines, in the same manner as any other writs appropriate to said General Register of Sasines; and registration thereof in the General Register of Sasines shall have all the like force and effect as registration in the Register of Interruptions of Prescriptions previous to the passing of this Act.

15. The Particular Registers of Inhibitions and Interdictions throughout

Scotland shall be discontinued, and all writs at present appropriate to those registers, or any of them, shall be registrable only in the General Register of Hornings, Inhibitions, and Adjudications, which shall be the only competent register for the registration of inhibitions and interdictions; and no publication whatever, of such writs, other than registration in said General Register of Hornings, Inhibitions, and Adjudications, shall in future be necessary, but such registration shall for all purposes whatsoever have all the legal effect of the publication at present in use.

16. The keeper of the General Register of Hornings, Inhibitions, and Adjudications shall keep only one minute book for inhibitions and adjudications, and shall frame only one index applicable to all inhibitions and adjudications recorded in his office; and such minute book and index shall be in such form as may be prescribed by the Lord Clerk Register.

17. The Particular Registers of Hornings and Expired Charges shall be continued as at the date of the passing of this Act: Provided always, that where any such register has been heretofore kept as a joint register of hornings and inhibitions, it shall cease to be a competent register for the registration of inhibitions.

18. It shall be competent, before or after execution of any inhibition, to register in the General Register of Inhibitions a notice thereof, setting forth the names and designations of the persons by and against whom the same is raised, and the date of signeting the same, in the form, as nearly as may be, of the schedule (C.) to this Act annexed; and where an inhibition and the execution thereof shall be duly registered in the General Register of Inhibitions not later than twenty-one days from the date of the registration therein of such notice thereof, such inhibition shall take effect from the date when such notice was registered as aforesaid, but otherwise only from the date of the registration of such inhibition and the execution thereof; and no inhibition shall have any effect against any act or deed done, committed, or executed prior to the registration of such notice thereof, or of such inhibition and the execution thereof, as the case may be.

19. Letters of inhibition may be in the form, as nearly as may be, of the schedule (D.) to this Act annexed; and letters of inhibition in such form shall have all the like force and effect as letters of inhibition in the form in use at the passing of this Act.

20. It shall be competent to register in the Register of Adjudications a notice of any signeted summons of adjudication, setting forth the names and designations of the pursuer and defender, and the date of signeting the same, in the form, as nearly as may be, of the schedule (E.) to this Act annexed; and where a decret of adjudication following on such summons shall be registered in the Register of Adjudications, such decret shall, where notice has been registered as aforesaid, take effect as if registered of the date of such notice, and otherwise only of the date of registration of such decret itself; and no summons or decret of adjudication shall have any effect against any lands and heritages prior to the date of such notice or decret, as the case may be.

21. The Lords Commissioners of Her Majesty's Treasury shall have power, upon the application from time to time of the Lord Clerk Register, to regulate the number of official searchers of the records, and to grant to such searchers such remuneration out of the fees of the searching department in the General Register House as their Lordships shall deem fit; and it shall be competent to any one ordering a search to select any one of the official searchers for the time being whom he may prefer to make the same.

22. It shall be competent to the Lord Clerk Register from time to time, after the discontinuance of all the Particular Registers of Sasines in terms of this Act, to make application to the Lord President of the Court of Session, the Lord Advocate, and the Lord Justice-Clerk, all for the time being, to reduce or regulate, and alter or vary, all or any of the fees drawn for the time in the General Register House at Edinburgh; and the Lord President, Lord Advocate,

tion and execution, *as the case may be*], and is, with said warrant of registration, recorded in the said Register of Sasines as follows :

[Insert full copy of the deed and warrant of registration, and, where deed is recorded for execution, insert warrant for execution as follows :

And the said Lords grant warrant to messengers-at-arms in Her Majesty's name and authority to charge the party or parties aforesaid, bounden by the foresaid writ, personally, or at his, her, or their respective dwelling place or places if within Scotland, and if furth thereof, by delivering a copy or copies of charge at the office of the Keeper of the Record of Edictal Citations at Edinburgh, to pay, implement, and perform the whole sum or sums or obligations, or any of them, specified in the said writ, all in terms and to the effect therein contained ; and that to the party or parties to whom the said sum or sums or obligations are, by the terms of said writ, payable or undertaken, within six [*or fifteen, as the case may be*] days if within Scotland, and if furth thereof, within twenty-one days next after he, she, or they are respectively charged to that effect, under the pain of poinding and imprisonment, the term or terms of payment being always first come and bygone ; and also with deduction of any sum or sums paid to account (if any) ; and also grant warrant to arrest the said party or parties bounden as aforesaid, his, her, or their readiest goods, gear, debts, and sums of money, in payment and satisfaction of the said obligations, or any of them : And if the said party or parties bounden as aforesaid fail to obey the said charge, then to poind the said party or parties bounden as aforesaid, his, her, or their readiest goods, gear, and other effects ; and, if needful for effecting the said poinding, grant warrant to open all shut and lockfast places in form as effairs]. Extracted on this and the preceding pages by me, Keeper of the General Register of Sasines [*or Deputy Keeper of the Records, or other officer duly authorized, as the case may be.*]

(Signed) A. B.

SCHEDULE (C.)

NOTICE of INHIBITION.

Notice of Letters of Inhibition.—A. B. [*insert designation of the inhibitor*] against C. D. [*insert designation of the inhibited*].—Signed [*insert date of signing*].

SCHEDULE (D.)

FORM of LETTERS of INHIBITION.

VICTORIA, etc.—To messengers-at-arms and others, our sheriffs, greeting : Whereas it is humbly shown to us by our lovite A. B. [*insert designation*], complainer, against C. D. [*insert designation*], that [*set forth as concisely as possible the document on which the inhibitor proceeds*] : Our will is herefore, and we charge you, that ye lawfully inhibit the said C. D., personally or at his dwelling place, if within Scotland, and if furth thereof, at the office of the Keeper of the Record of Edictal Citations at Edinburgh, from selling or otherwise affecting his lands or heritages to the prejudice of the complainer ; and that ye cause register these our letters in the General Register of Inhibitions at Edinburgh for publication to our lieges. Given under our signet at Edinburgh, this
day of in the year

SCHEDULE (E.)

NOTICE of SUMMONS of ADJUDICATION.

Notice of Summons of Adjudication.—A. B. [*insert designation of pursuer*] against C. D. [*insert designation of defender*].—Signed [*insert date of signing*].

ADMINISTRATION OF TRUSTS (SCOTLAND) BILL.

*A Bill to facilitate the Administration of Trusts, and to regulate the Powers of Trustees in Scotland.*¹

Whereas it is expedient that certain powers and provisions which are now usually inserted in trust dispositions and settlements in Scotland should be made incident to the office of trustee, and that greater facilities should be given for the exercise of the jurisdiction of the Court of Session in the administration of trust estates: Be it therefore enacted, etc.

1. In all cases where by a disposition or deed of settlement of heritable property it is declared that trustees shall have a power of sale, either generally or in any particular event, in relation to any heritable property, whether vested in them by such disposition or settlement or not, it shall be lawful for such trustees to exercise such power of sale by selling such property either by public roup or private bargain, and either together or in lots, and either at one or at several times; and it shall be lawful in such sales to reserve the minerals, or to sell under reservation of a feu duty or ground annual.

2. Trustees empowered or directed to invest money or the proceeds of property appointed to be sold in the purchase of heritable estate, may (with leave of the Court, to be obtained upon a summary application, as herein-after provided) apply the whole or part of such money or proceeds in paying off or redeeming any debt or burden affecting lands which may be destined to the same series of heirs, and subject to the same conditions as are by the trust deed made applicable to the lands directed to be purchased.

3. Trustees empowered or directed to purchase heritable estate for the purpose of executing a settlement thereof in terms of the truster's directions may, if the funds at their disposal are not sufficient for the purchase of an estate which is in other respects eligible, borrow as much as may be requisite (not exceeding one half of the price of the estate) on the security of the purchased estate, and may convey the same in terms of the settlement subject to such heritable burden.

4. The *bond fide* payment to and the receipt in writing of any trustee or trustees (or of a quorum of trustees where there are more than one), to whom any money shall be payable in the execution of any trust, or of their factor duly authorized, shall effectually discharge the person paying the same from seeing to the application of or being answerable for the loss or misapplication of such money.

5. Where, in virtue of any *mortis causâ* or marriage contract settlement, heritable property shall be vested in trustees, and no provision is made by the settlement for the sale of such property, the trustees may apply by petition to the Court of Session for authority to sell the same under such conditions as are usual in the case of the sale of trust property by a judicial factor, and it shall be lawful for the Court to grant authority for the sale and disposition of all or part of such property, if it is shown to the satisfaction of the Court that the trust estate is insufficient for the maintenance of the truster's family (where the trust is for their benefit), and that more ample provision can be made for their maintenance out of the proceeds of the estate when sold, or if it is shown to the satisfaction of the Court that a sale of the truster's heritable property is expedient.

6. It shall be lawful for the Court, upon application for that purpose by petition, to grant authority to trustees to feu the trust estate or part thereof for building purposes, upon being satisfied that the exercise of such authority would be beneficial to the parties interested in the trust.

7. The Court may, if expedient, grant authority to trustees to borrow money on the security of the trust estate, and may, if expedient, confer upon trustees

¹ [Some corresponding provisions will be found in the English Statutes, 11 Geo. 4 & 1 W. 4. c. 46, 13 & 14 Vict. c. 60, 15 & 16 Vict. c. 55, 22 & 23 Vict. c. 85, 23 & 24 Vict. c. 145, and 25 & 26 Vict. c. 108.]

such other powers as have been or may be in use to be conferred on judicial factors upon special application.

8. In the event of a trustee or other person holding an office of trust being desirous of purchasing any property, being part of the estate under his administration, it shall be lawful for the Court, upon an application by such trustee or person, to authorize his co-trustees (or a judicial factor or manager to be appointed for the purpose) to receive an offer from and to sell to such trustee or person subject to such conditions as may appear sufficient for the protection of the interests of the beneficiaries: Provided that any person beneficially interested in the trust may appear and object to such application being granted; and that the expense of the application, including the expense of such appearance, shall be borne by the trustee applying for authority to purchase.

9. The Court may authorize a party holding the office of trustee to accept a salaried office under the trust, or to enter into any other lucrative transaction with his co-trustees or other parties representing the trust, provided it shall appear that such authority may be granted without prejudice to the interests of the trust.

10. Trustees having trust money in their possession which it is their duty to invest at interest, shall be at liberty to invest the same in the purchase of any of the Parliamentary stocks or public funds, or East India stock, or stock of the Bank of England, or to lend the same on the security of any of the aforesaid stocks or of real property in any part of the United Kingdom (and for the purposes of this Act the debentures or debenture stock of any railway company paying dividends to shareholders shall be held to be real security), and also from time to time at their discretion to vary any such investments as aforesaid, and shall not thereby incur any responsibility for depreciation in the value of such investments and securities, provided they were reasonable and proper at the time: Provided also, that trustees under a Scotch trust shall not be held to be subject, as defendants or respondents, to the jurisdiction of any of Her Majesty's superior courts of law or equity in England or Ireland, by reason of their having invested trust funds in English or Irish securities.

11. Where a trust estate consists in whole or in part of an interest in a mercantile business, or of stock or shares in a mercantile company, or of money invested on the security of personal property, and it shall be made to appear to the satisfaction of the Court upon a summary application by the trustees that the immediate sale or realization of such part of the estate would be prejudicial to the interests of the parties taking benefit by the trust, it shall be lawful to the Court to grant authority to the trustees to continue the existing investments of the trust estate: Provided always, that in the event of any circumstances afterwards occurring or coming to the knowledge of the trustees, which may render it doubtful whether such investments ought to be longer continued, the trustees may either proceed to realize the estate on their own responsibility or may apply for further directions under the powers herein-after conferred; and no trustee shall be liable for any loss or depreciation in the value of any investment authorized as aforesaid, upon an application fairly disclosing the circumstances material for the consideration of the Court, unless he shall have culpably neglected to realize or to apply for further directions, while in the knowledge of circumstances materially affecting the security of the investment.

12. In all cases where any fund is held by trustees on behalf of minor children, it shall be lawful for the Court to authorize the advancement of a part of the capital or fee of such fund for the maintenance of the family, in such circumstances as those in which the Court has been or may be in use to grant such authority (unless such advancement is expressly prohibited by the trust), and authority may be granted as aforesaid, notwithstanding that by the deed of trust the destination of the capital or fee is subject to a clause of survivorship, with or without a reversion to the issue of such minor children.

13. No deed of appointment or division which shall hereafter be made in the exercise of any indefinite power to apportion or divide any property amongst

several objects, shall be deemed to be invalid or ineffectual on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left to devolve upon any one or more of the objects of such powers.

14. Trustees who have distributed the trust funds and estate extrajudicially may apply by petition to the Court for exoneration and discharge, and after such intimation and advertisement, inquiry by remit to an accountant, or otherwise as may be expedient, the Court may discharge such trustees from their actings and intromissions, which discharge shall have the like effect as a decree pronounced in an action of exoneration, and the expense of such application shall be chargeable against the trust, unless the Court on special grounds shall think fit to refuse the trustees their expenses: Provided that the surplus of any sum reserved to meet the expenses of the application shall, before such discharge is granted, be paid over to the parties entitled thereto.

15. Trustees who may be desirous of distributing the trust funds and estate, or so much thereof as may be remaining in their hands under the authority of the Court, may apply by petition to the Court for authority to distribute the same, and also for exoneration, specifying in such petition, or in a separate account or paper to be lodged as relative thereto, the funds and property which they desire so to distribute; and after intimation, and advertisement, and inquiry, as mentioned in the preceding section, the Court may grant warrant to distribute the said trust funds and estate in terms of a scheme of distribution approved by the Court, and may afterwards discharge the trustees from their actings and intromissions: Provided that, in case of opposition to the petition, the Court may sist process in order that proceedings may be taken by action for the determination of the matters in controversy; and trustees shall not be entitled to the expenses of any such application by petition, if at the time of presenting it they had intimation of competing claims to the funds or estate in their hands.

16. The Court may, upon an application by petition, discharge any trustee who may resign while the trust is subsisting; and the expenses of the application shall be in the discretion of the Court.

17. Application may be made by petition at the instance of trustees, or of any individual trustee, for the opinion and direction of the Court on any question respecting the management or administration of the trust property; and any trustee acting upon such opinion and direction obtained upon an application fairly disclosing the circumstances material for the consideration of the Court, shall be held to be discharged from personal responsibility for anything done in pursuance of such opinion and direction: Provided that the Court shall not by this form of process be required to determine *ex post facto* any question of personal liability, or to adjudicate in any matter resolving into a competition of interests, or any question of proprietary right.

18. And whereas the power of appointing trustees, which belongs to the Court of Session in virtue of its equitable jurisdiction, has been exercised with advantage in connection with the administration of trusts for charities, and other public or quasi-public purposes: And whereas, in consequence of the increased facilities afforded by this Act for bringing the administration of private trusts under the control of the Court, it is expedient that the power of appointing trustees upon private trust estates should be more frequently exercised by the Court in cases where trustees cannot be, or cannot conveniently be, appointed by way of assumption: Be it declared and enacted that the Court, upon the application of any party having an interest, may appoint a trustee or trustees upon any estate requiring to be administered as a trust estate, to act either by himself or themselves, or in conjunction with any other person or persons, who at the time of the application shall be in the exercise of the office of trustee; and either with the powers (if any) of the deed by which the purposes of the trust are declared, or with the powers usually conferred on judicial officers, or with such other powers as may be lawfully conferred, and the powers of the whole body of trustees, including any who may previously

have been in the exercise of the office, shall be such only as the Court shall appoint.

19. The Court may direct or regulate the duties to be performed by any trustees or trustee acting under powers conferred by judicial appointment; and such direction or regulation may be declared either at the time of making the appointment, or by an interlocutor to be pronounced in any incidental application by such trustees or trustee, or other party having an interest; and for that purpose the original process of appointment shall be held to be in dependence, while the appointment subsists, and the Court may also require trustees acting under such powers to lodge an inventory or inventories of the trust estate, and may require any factor or salaried officer of the trust to find caution for his intrusions.

20. Trustees appointed by the Court shall have the same powers, rights, and immunities as trustees acting under the authority of the truster, except in so far as their powers are limited by the terms of their appointment; but shall not have the power of assuming new trustees, unless such power is expressly conferred upon them by the Court, and such trustees shall be at liberty to apply for special powers, or for the opinion and direction of the Court, by lodging a note in the process of appointment, which shall be intimated to the parties interested, or to such parties as the Court may appoint.

21. It shall be lawful for the heir of line of the survivor of any body of trustees acting under the authority of a deed of trust to make up a title by service to any heritable estate which may have been vested in such trustee, either alone or in conjunction with other trustees, under a destination express or implied to such trustees, and the survivors or survivor of them; and thereafter to convey the same to the parties beneficially interested therein, or to any other party or parties with their consent, and at their request; and it shall be lawful for the heir of line of any such surviving trustee, duly served as such, to apply for and obtain himself decerned and confirmed executor dative *qua* special disponee, *ad non executa*, to such part of the moveable trust funds or estate as may not have been distributed, and thereafter to pay or convey the same to the parties respectively entitled thereto, and for that purpose every trust disposition or deed which contains or is held in virtue of the Act twenty-fourth and twenty-fifth Victoria, chapter eighty-four, to contain a destination to the surviving trustees or trustee acting under the authority of such deed shall also be held to contain an ultimate destination to the heir of line of the last survivor of such trustees: Provided always, that any such party making up a title as heir of a trustee shall not be deemed to be a trustee, and shall not be entitled to execute the trust, except to the effect of conveying the estate to the parties entitled thereto, and shall not be liable to any responsibility except for his own acts and deeds.

22. Where any person shall be entitled to the possession for his own absolute use of any estate, heritable or moveable, the title to which has been vested in or taken in the name of or conveyed to any trustee or other person who has died or become incapable of acting without having executed the trust reposed in him, then, and in all such cases, in lieu of an application to the Court for the appointment of a judicial factor, and thereafter for authority to such factor to make up titles in his person, it shall be lawful for the party or parties beneficially entitled to such estate to apply by petition to the Court for authority to complete a title in their persons to such estate, at the sight of a person to be appointed by the Court, and such petition shall specify the lands or other estate, heritable or moveable, to which such title is to be completed, and if, after intimation and inquiry (if inquiry is requisite), the Court shall be satisfied that the prayer of the petition may be granted, it shall be lawful for the Court to grant a warrant for completing such title as aforesaid, which warrant shall specify the lands or other heritable estate to which it is applicable, and shall also specify the moveable estate, or shall bear reference to any inventory appended to the petition in which such moveable

estate may be specified ; and such warrant shall be effectual as a conveyance of such heritable and moveable estate in favour of the petitioners in like manner as a warrant in favour of a judicial factor granted under the authority of the thirty-eighth section of the Titles to Land (Scotland) Act, 1860.

23. All applications to the Court of Session under the authority of this Act shall be brought in the first instance before one of the Lords Ordinaries officiating in the Outer House, and the powers of the Lord Ordinary before whom the petition is enrolled may be exercised by the Lord Ordinary on the Bills during vacation ; and all such petitions shall, as respects procedure and review, be subject to the same rules and regulations as are enacted with respect to petitions coming before the Junior Lord Ordinary, in virtue of an Act of the twentieth and twenty-first years of the reign of Her present Majesty, chapter fifty-six, or as may be enacted by any Act to be passed in the present session of Parliament : Provided always, that where in the exercise of the powers pertaining to the Court of appointing trustees and regulating trusts, it shall be necessary to settle a scheme for the administration of any charitable or other permanent endowment, the Lord Ordinary shall, after preparing such scheme, report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled, and in all cases where it shall be necessary to settle any such scheme, intimation shall be made to Her Majesty's Advocate with a view to his appearance for the public interest.

24. The provisions of this Act, so far as applicable, shall extend to executors as well as trustees, and also to all judicial factors and other persons appointed to offices of trust by the Court of Session ; and no application to the Court by one of several trustees or executors shall be held to be incompetent by reason of the refusal of the other trustees or executors to concur in such application.

25. The Court of Session shall be, and the said Court is hereby empowered from time to time, from and after the passing of this Act, to make such regulations by acts or act of sederunt as may be requisite for carrying into effect the purposes of this Act : Provided always, that within fourteen days from the commencement of every future session of Parliament there shall be transmitted to both Houses of Parliament copies of all acts of sederunt made and passed under the powers hereby given.

26. Excepting in so far as regards the power herein before given to the Court of Session to pass acts of sederunt, this Act shall take effect from and after the first day of November one thousand eight hundred and sixty-four, and shall apply to trusts already in operation, as well as to future trusts.

27. This Act may be cited for all purposes as 'The Trust Administration (Scotland) Act, 1863.'

Correspondence.

ORDERS FOR PROOF.

To the Editor of the Journal of Jurisprudence.

SIR,—With reference to the recent correspondence in your Journal on this subject, I would humbly submit, whether in ordinary cases, when probation is to take place, the proper interlocutor should not be simply, 'Allows parties a proof,' holding as thereby permitted, all proof relevant to the matter at issue.

I have always considered it was intended by the Sheriff Court Act of 1853 to assimilate the procedure in proofs to what is followed before a jury ; that is, that each party should lead his whole proof at once, and

continuously. Why may not a pursuer in the Sheriff Court adduce his conjunct proof with that in chief, and in anticipation of the defender's, in the same way as he would have been forced to do before a jury? If there is reason for alleging surprise, or need for explanation, of course that may be made a ground for craving an adjournment and a special order for further probation. S. S.

[The form of the interlocutor appears to us to be a matter of very little consequence. We concur with our correspondent in thinking that proofs, whether taken in the Sheriff Court by the judge himself, or, as in the Court of Session, by a commissioner, ought to proceed continuously, and in the same manner as at a jury trial; but we are in favour of allowing a proof in replication by the party taking the lead, such proof to be strictly cross to the respondent's proof.—ED. J. J.]

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

CULLEN'S EXRS. v. SIR WM. JOHNSTON AND OTHERS.—*May 19.*

New Trial.

In this case it will be remembered the jury, after a trial of nine days in March last, were dismissed without any verdict being returned, the majority being less than nine to three. To-day it was fixed that another trial should take place at the sitting of the Jury Court in July next, and that the jury should consist exclusively of special jurors.

SCOTT AND COMPANY v. JOHN CAMPBELL AND OTHERS, COMMISSIONERS OF THE BURGH OF LOCHGILPHEAD.—*May 19.*

Contract—Relevancy.

This was an action brought at the instance of the representatives of a contractor for payment of work done in the employment of the commissioners. On the record being closed, the defenders objected to the pursuers obtaining any issue, on the ground, first, that they had no sufficient averment to the effect that the defenders ever authorized the employment libelled; and secondly, that the date when the contract of employment was said to have been entered into was nowhere stated.

The Lord Ordinary reported the case, and the Court to-day, after a full argument, sustained the objections to the relevancy, and assoilzied the defenders with costs.

SECOND DIVISION.

MORRIS v. BICKET.—*May 20.*

Property—Interdict.

This was a reclaiming note presented by Morris and his wife against an interlocutor pronounced by Lord Jerviswoode, Ordinary, in conjoined

actions of suspension and interdict, and declarator and interdict, at their instance against Bicket. The pursuers of the actions stated that they were proprietors of certain house property in Kilmarnock, and alleged that under their titles, and as owners of this property, they had a right and interest in the bed of the stream adjoining it. They further alleged that the defender, an opposite proprietor, had built the wall of certain houses, recently erected by him, farther into the bed of the river than the previously existing wall, and beyond a line up to which the pursuers had agreed that he might build without objection on their part, thereby interfering with the *solum* of the channel and diverting the course of the stream. The pursuers allege that these operations were detrimental to their property, and sought in these actions to have the defender ordained to remove the encroachment complained of, and desist from similar encroachments in future. The defender denied the alleged encroachment, and likewise denied the title of the pursuers to insist in the actions, on the ground that the buildings had been entirely erected on that part of the *solum* of the river which belonged to him (the defender), and that no injury had been caused by their erection to the pursuers' property. The Lord Ordinary, after a proof, found that the pursuers had failed to prove the alleged encroachment on the part of the defender, and therefore assoilzied the defender, with expenses in both actions. The Court, on the 18th March last, recalled the Lord Ordinary's interlocutor, and found that the river wall complained of had not been built in conformity with the agreement between the parties, and appointed parties to be heard upon the question raised as to the title of the pursuers to insist in the actions.

After hearing counsel, the Court to-day advised the case.

The Lord Justice-Clerk said—The parties in this case, the pursuer and defender, are proprietors on the banks of the Water of Kilmarnock. The pursuer in the present action complains of an invasion by the defender of the *alveus* of the stream, which it is said inflicts a legal injury on his opposite neighbour, the pursuer. The main contention of the defender, upon the assumption that the line of his wall does extend into the *alveus* of the stream farther than was permitted by the agreement, is, that the pursuer is not entitled to object to that unless he can show that he is actually prejudiced thereby—that the extension of the line of the wall is productive of damage to his property upon the other side. The defender, on the other hand, contends that any advance into the *alveus* of the stream, however slight—be it to the extent of one inch or one hair's-breadth—constitutes a legal wrong, and therefore that he is entitled to obtain redress against it, even although it could be shown that the operation is not only not injurious but beneficial to both parties. I do not think it necessary to adopt the extreme view contended for by either party. The property of these two neighbours on the opposite sides of the stream is said to be, and is by their titles described as being, bounded by the stream. The effect of that in law is, that each is proprietor up to the *medium filum fluminis*, and that *medium filum* constitutes the boundary or line of march between the two estates. It is a mistake to say that the *alveus* of the stream is the common property of the two proprietors of the banks. But although the *alveus* of the stream is thus divided between the two proprietors of the opposite banks, and is held by each up to the *medium filum* in sole property on either side, it does by no means follow that they have not

common interests. They have a common interest in the water. It is out of that kind of common interest that the legal principles arise which are applicable to the present case. I think the general rule of law unquestionably is, that a proprietor upon the banks of a stream of this kind is not entitled to make any erection whatever *in alveo*. He is undoubtedly entitled to defend his land against inundation by fortifying the bank of the stream, but even that right he must exercise under certain restrictions. He must have some regard to the interests of his opposite neighbour, even in the exercise of that right. But the general rule unquestionably is, that even for the purpose, and where it may be shown to be absolutely essential for the defence of his own property, he has no legal right to make any erection *in alveo*. This principle or rule of law is very clearly stated by Lord Kilkerran in reporting two cases which were referred to in the course of the argument—the first, the *Town of Aberdeen v. Menzies*, in which he says:—‘Though it is not allowable for conterminous heritors *aliquid erigere in alveo fluminis* which runs between their several lands, yet it is allowable to either *munire ripam*, so as to prevent the rivers encroaching upon them;’ and the other, the case of *Farquharson v. Farquharson*, in which he states again:—‘It is lawful for the heritor to build a fence upon his own ground upon the side of the river, to prevent damage to his ground by the overflow of the river, but it was found not lawful to use any operation on the *alveus*.’ The authority of Lord Kilkerran in a matter of this kind is undoubtedly very high; and although these propositions may not be absolute matter of decision in the cases to which I have referred, we may safely conclude that Lord Kilkerran is there stating in general terms what was understood in his day upon the bench to be the undoubted law of Scotland upon the subject, as stating the distinction between the legal right of fortifying the bank properly so called and the right to make an erection *in alveo*. But this authority receives very great additional support and confirmation by the well-known case of *Menzies v. Breadalbane*, in which the question ultimately decided in the House of Lords related only to an operation performed by Lord Breadalbane upon the bank of the river, but which in its original shape in this Court was a complaint against two different kinds of erections by Lord Breadalbane—one on the bank, and the other *in alveo*. There the Lord Ordinary, apparently without any interlocutor at all, declared the interdict perpetual in so far as regarded the erection *in alveo*, simply because there was such an erection, because that was its local situation; and the only question that was seriously argued between the parties related to the operations which were made on the banks of the stream, and with reference to that question there was some difference between the Court below and the Lord Chancellor in advising the House of Lords, because the Court of Session thought the operations upon the bank were defensible, and they therefore recalled the interdict and allowed these erections to stand; but the House of Lords, as advised by Lord Eldon, were of opinion that it was an excessive view of the right of the proprietor to embank in the way he had done; and, accordingly, the House ordered and adjudged that the respondent ought to be prohibited and interdicted from the further erection of any bulwark or other *opus manufactum* on the banks of the River Tay, which may have the effect of diverting the stream of the river in times of flood from its accustomed course, and throwing the same

upon the lands of the appellant. From these the House of Lords held that, in order to justify a prohibition against the erection of an *opus manufactum* upon the bank, it must be shown that it would have the effect of diverting the stream of the river from its accustomed course, and throwing it upon the lands of the appellant. To interfere with the proprietor upon the bank from exercising his right *munire ripam*, it was necessary to show that the party complaining of that operation would be injured. But in regard to the erections *in alveo*, there was no such restriction at all in the judgment of the Lord Ordinary. On the contrary, he at once interdicted any proceeding of that kind as being in itself plainly illegal. Such being the state of the authorities, I entertain no doubt that a party in the position of the defender here is not entitled to make any erection *in alveo*. But, then, at the same time, if it could be shown that the party complaining of a very slight encroachment upon the *alveus* was doing so for the mere purpose of annoyance—in *emulationem vicini*—not under any apprehension of danger to himself, or of damage to his property, but merely for the purpose of asserting his legal right up to a definite line, if it could be shown that the work had been accidentally extended into the *alveus*—that it was *innocue utilitatis*, that it was beneficial to the complainer as well as to the respondents, I am not prepared to say that I could hold such a work to be illegal, or that it could be prohibited in the course of erection, and for the reason that I have stated, that this is not a subject of common property, and therefore the maxim *melior est conditio prohibentis* is not applicable. The question thus comes to be, whether the pursuer in this case, though he cannot (and that is the fair result of the proof) show that any damage has actually been occasioned by the erection of this wall, is not in a position to say that an injury has been done to his property, because the operation involves a certain risk of damage. That is a principle which is clearly applicable to cases of this kind, and to that principle we gave effect in a case which must be in the recollection of your Lordships—the case of *Gellatly v. Arrol*, which was a case of common interest and not a case of common property, in which, as here, we rejected the maxim *melior est conditio prohibentis*, because it was a case of common interest and not a case of common property, but in which we directed the restoration of the gable against the operations which had been made upon it, because these operations involved clearly a risk of danger or damage to the party complaining, in reference to his interest in the gable. Now, here I think the same principle is very plainly applicable, for there is nothing the operation and action of which are more uncertain than running water. The smallest interference with the course of running water may be productive of effects which nobody can foresee or could have contemplated; and although engineers are very skilful, no doubt, in generally foreseeing what the action of water will be, I doubt whether an engineer can absolutely insure one as to what shall be the precise effect of an alteration, however slight, in the course of a running stream. And therefore I think, looking to the nature of the subject, and to the fact that this is not an encroachment of an inch or two, or any such mere impalpable encroachment as that, but that it is an encroachment clearly established to be of considerable size, and certainly calculated to effect some deviation in the course of the water, it appears to me that the opposite proprietor, the pursuer, is well entitled to say, I apprehend risk

to my interest, I apprehend that my property may be affected by the consequences of this diversion of the stream, and therefore, seeing that you have no legal right to interfere with the *alveus* at all, I am quite entitled to have your *opus manufactum* removed.

Lords Benholme and Neaves, in elaborate opinions, concurred. Lord Cowan was absent when the case was decided, but his Lordship heard the argument, and was understood to concur. The judgment of the Court is in the following terms:—

Edinburgh, May 20, 1864.—The Lords having resumed consideration of the cause, and heard counsel in terms of the appointment contained in the interlocutor of 18th March last, and also on the whole remaining pleas of parties, find that the erection complained of by the pursuers is an erection in the *alveus* of the water of Kilmarnock, *ex adverso* of the pursuers' property, and has the effect of diverting to a certain extent the flow of the water, and is therefore an illegal encroachment on the rights of the pursuers; therefore find and declare, decern and ordain, interdict, prohibit, and discharge, in terms of the conclusions of the summons; and in the suspension and interdict, sustain the reasons of suspension and suspend and interdict as craved, and declare the interdict as perpetual:—Find the pursuers and suspenders entitled to the expenses of process, and remit to the auditor to tax the same and to report.

(Signed) JOHN INGLIS, *I.P.D.*

BISSET v. ECCLESFIELD.—May 21.

Defamation—Issue.

In this case, the pursuer proposed to try an action of damages for slander by the following issue:—‘Whether, on or about the 7th, 10th, 11th, 12th, 13th, 14th, 25th, 26th, 27th, and 28th days of April 1860, or on one or more of said days, within the village of Newhaven, and in the presence and hearing of Andrew Paxton, residing in Newhaven; John Campbell, carter, Newhaven; James Young, police-constable, Newhaven; David Steele, porter, Newhaven; James Rankine, police-constable, Newhaven; Alexander Dickson, Newhaven; William Morrison, Newhaven; John Alexander, grocer, Newhaven; Mrs Alexandrina Miln or Paxton, Newhaven, wife of the foresaid Andrew Paxton; and George Dempster, grocer, Newhaven; or in the presence and hearing of one or more of said persons, the defender did falsely and calumniously say that the pursuer was a thief and a damned blackguard, and that he had stolen three bags and a cask or barrel, the property of the defender, to the loss, injury, and damage of the pursuer?’

Damages laid at L.400.

The Court disallowed the issue, and dismissed the action with expenses.

The Lord Justice-Clerk said—I don't think that any of the cases quoted by the pursuer are applicable to the present. The case of *Lockhart* was determined by this peculiarity, that, although a number of days were put in issue, the slander was uttered to all the individuals specified, and was uttered in the same place. In considering an issue like the present, it is necessary to take into view at the same time the number of days, the number of persons, and the place; and there is therefore nothing in the case of *Lockhart* that justifies the issue proposed by the pursuer. In the case of *Swanson*, where there were two issues, the first was unobjec-

tionable in point of specification, because it was founded on the averment that on or about the 28th February 1856, the defender uttered the slander within the Wellington Hotel, Wick, in presence of certain persons named. That issue was perfectly unobjectionable, and the only peculiarity of the case was whether the defender was to be allowed to circulate the slander through the town of Wick. To deny him a proof that it was so circulated, would be to deny him the most aggravating part of the slander. But in the present case there were ten separate days, and ten separate persons in whose hearing the slander was uttered, and the *locus* specified is the entire village of Newhaven. We must take all these and consider them in combination. His Lordship concluded by pointing out that under such an issue as that proposed by the pursuer he might be able, and it might be his object, to prove that the slander had only been uttered once; and that if it were so, the defender might be placed in a most unfair position at the trial. No pursuer is entitled to wrap up the facts of a case in such a manner as it is here, and therefore the issue must be disallowed.

. HIGH COURT OF JUSTICIARY.

Susp. and Lib., GRAHAM v. TODRICK.—May 21.

Ambiguous Verdict.

This was a case of suspension and liberation at the instance of Robert Graham, slater, who was tried by a jury before the Sheriff Court, Haddington, on the 4th April, on two separate charges of stealing a number of hens by means of housebreaking, aggravated by previous conviction. When the case went to trial, the Procurator-Fiscal adduced evidence in support of the second charge only in the indictment, but made no attempt to prove the first.

After hearing the evidence, the jury returned a verdict finding the pannel guilty of the crime of theft by means of housebreaking, aggravated by previous conviction, on which verdict the Sheriff-Substitute found the pannel guilty as libelled, and sentenced Graham to six months' imprisonment.

The bill of suspension and liberation was raised on the ground that the verdict was too ambiguous, and did not point out whether the pannel was guilty of both charges, or of which particular charge, and the sentence of the judge was not in conformity with the verdict, and was besides not according to fact or proof, and incompetent and illegal, and therefore ought to be set aside, and the prisoner liberated.

After hearing counsel for both parties, the following interlocutor has been issued:—

'*Edinburgh*, 21st May 1864.—The Lord Justice-General and Lords Commissioners of Justiciary having considered this bill and heard counsel for both parties, pass the bill, suspend the sentence complained of *simpliciter*, ordain the suspender to be immediately set at liberty, and decern: find the respondent liable in expenses, and remit the account thereof to the clerk of Court to tax and report.

(Signed) 'DUN. M'NEILL, I.P.D.'

English Cases.

LANDS CLAUSES CONSOLIDATION ACT.—The 16th and 17th sections of the Lands Clauses Consolidation Act, requiring the whole capital to be subscribed and a certificate obtained from Justices to that effect before proceeding to take lands compulsorily, do not apply to the case of a branch railway authorized to be made by an already existing company. It is not necessary, in order to entitle a railway company to take land for the purpose of their works, that the particular works should appear on the deposited plans. It is sufficient that the land should be within the limits of deviation delineated on the plan.—(*Weld v. the South-Western Rail. Co.*; Master of the Rolls, 33 L. J., Ch. 142.)

WINDING-UP OF COMPANIES.—An insurance company issued policies providing, in some instances, 'that the capital stock and funds of the company should be subject and liable to pay' the amount insured; in others, 'that the capital stock, or so much thereof as should for the time being have been subscribed, and other the stocks, funds, securities, and property of the company unapplied at the time of any demand made, should alone be liable to answer,' etc.; in others, 'that the stock and funds of the company should alone be answerable under this guarantee;' and all the policies contained a proviso that no officer or shareholder of the company should be liable for any demand beyond the amount of his particular share or interest. It was held, that these expressions and clauses did not create such a charge upon the stock and funds of the company as to give the policy-holders any claim upon its assets in preference to the general creditors of the company. Lord Justice Turner: By the common law every shareholder, as a partner in the company, would be liable on all its contracts; and provisions of this nature were no doubt introduced for the purpose of limiting the legal liability, not for the purpose of creating a charge in equity. Again, it is to be observed that it was necessary that some words should be introduced into the operative parts of the policy, in order to create an express contract. If the case had been left on the proviso alone, there could have been nothing more than an implied contract. If, instead of the words 'stock and funds of the company,' the words introduced had been, 'the company shall be subject and liable to pay,' the very inconvenience which, no doubt, was intended to have been avoided, would at once have been created. There was a sufficient reason, therefore, for the introduction of the words in question, without imputing any intention to create a charge in equity; and certainly, in considering the effect to be given to those words, the inconvenience which would result from the construction contended for by the appellants, ought not, as I think, to be disregarded.—(*Re the State Fire Insur. Co.*, 33 L. J., Ch. 123.)

SCOTCH CONFIRMATION.—The form of a testament testamentar, or confirmation of an executor nominate, contained in Schedule E. of the Confirmation and Probate Act, 1858 (21 & 22 Vict., c. 56), recites that the executor nominate has given upon oath an inventory of the personal estate and effects of the deceased 'at the time of his death,' situated in Scotland, or England or Ireland. A confirmation was tendered for sealing, from which the words 'at the time of his death' were omitted; and it was held, those words were properly omitted since the 23 Vict., c. 16, and the 23 & 24 Vict., c. 80, and the confirmation was ordered to be sealed.—(*In the goods of Hay*, 33 L. J., Pr. and M. 25.)

ACTION.—Commissioners under the 'Towns Improvement Clauses Act, 1847, are liable to an action, in their corporate capacity, at the suit of a person who has suffered damage from a highway, within the limits of the defendants' special

Act, being allowed by them to remain in a dangerous condition. *Crompton, J.*: A corporation are charged in this declaration with not having performed a duty cast on them by an Act of Parliament; and special damage having arisen, the question is, will an action lie against them? *Young v. Davis* (7 Hurl. and N. 760; S. C. 31 L. J. (N. S.), Ex. 250) is relied upon by the defendants as showing that it will not; but, as I pointed out in the course of the argument, that case is not applicable. . . . Then it is said the commissioners can only raise 2s. 6d. in the pound, and they must apply it in a particular way; therefore it should have been averred that they had funds, and funds applicable for this purpose. I do not think it was necessary to aver they had funds; the Act lays the duty on them, and they must do it. The parish, before this Act, could not have said, We shall not repair because we have no funds; neither can the commissioners now. The section not only imposes a punishment on the commissioners for not doing the repairs, but it also obliges them to take care that the repairs are done, and they are liable to an action if a private person suffers special damage.—(*Hartnall v. the Ryde Commissioners*, 33 L. J., Q. B. 39.)

CHARTER-PARTY.—A description in a charter-party, made at New York between British subjects, that a vessel was 'the A 1 Br. brig H. E. of Liverpool' is a warranty that the vessel was at the time classed A 1 at Lloyd's in London. The owners of a vessel, which had once been classed A 1 at Lloyd's in London, authorized their agent, by power of attorney, to charter the vessel or to employ her as a general ship on any voyage, on such terms and in such manner as he should think proper, and to represent the owners in relation thereto, and generally in relation to her management or sale, as fully in all respects as if the owners were personally present, and to do all things necessary for that purpose though the same were not specially mentioned. This was held to give the agent authority to enter into a charter-party with the warranty that the ship was, at the time of the charter-party, A 1 at Lloyd's, though she was not so described in the power of attorney, and though she had ceased to be so classed when the power was given.—(*Routh v. Macmillan*, 33 L. J., Ex. 38.)

PROFESSIONAL NEGLIGENCE.—In an action for breach of a covenant to execute a mortgage, in consequence whereof the money was not advanced, and prior mortgages sold the property and plaintiff sustained a loss, it was held, by Pollock, C. B., and Bramwell, B., that the plaintiff was only entitled to recover, as damages, the costs attending the preparation of the abortive mortgage; by Martin, B., that the plaintiff was entitled, in addition, to recover the difference between L.5000 (the intended mortgage) and the value of the land as building land as contemplated by the indenture if the L.5000 had been obtained, or, at all events, that he was entitled to L.900, the residue of L.5000, after paying the L.4100 agreed to be taken by the first mortgagees. Bramwell, B.: The action is brought for the defendant's breach of covenant in not executing the intended mortgage, and we have decided the defendant is liable to some damages. The question is, What? We are of opinion, only to the expense of the abortive mortgage. The defendant may be the *causa sine qua non*, but is not the *causa causans* of the alleged loss. If the intended mortgagees had not insisted on the defendant's execution; if they had not had a power of sale; if they had not exercised it; if another mortgagee had been found; if the plaintiff had purchased; if the sale had been favourable, the loss would not have happened; nay, if the plaintiff had paid the defendant his claim, L.350, it would not have happened. The defendant is not the cause of all these things happening and not happening. If the defendant is liable to these damages, so would the intended mortgagees be if the mortgagee had gone off by their default; so would every intended lender of money, at all events if he knew the purpose for which it was to be borrowed. It is said that, at all events, he is liable for L.900, the difference between L.4000 and the L.5000 which the plaintiff could have had certainly, and has certainly lost; but the former reasoning applies to this. Each claim is based on the same fallacy.—(*Duckworth v. Ewart*, 33 L. J., Ex. 24.)

MARITIME DAMAGE.—To a declaration for negligently running down plaintiffs' vessel, defendants pleaded that plaintiffs had taken proceedings in the Court of Admiralty against the ship and freight, and had arrested the ship and caused her to be sold, and that the money arising from the sale and the amount of the freight was paid into that Court to abide the decision, and that the same had been ordered to be paid out to plaintiffs by that Court. It was held, this was a bad plea, and the proceedings in the Court of Admiralty no bar to the subsequent proceedings in this Court.—(*Nelson v. Couch*, 33 L. J., C. P. 46.)

MARINE INSURANCE.—The fact of giving instructions for an insurance of a ship and obtaining a slip from the intended insurers, does not amount in law to an insurance. Whilst an action was pending, the parties agreed that no judgment should be signed if a mortgage upon a certain ship was delivered to plaintiff, and the ship was kept insured to the amount secured by the mortgage. Defendants failed to keep the ship actually insured for three days, although they had given instructions for the insurance, and had received the usual slip from the underwriters, in accordance with which the policy was afterwards executed; and it was held, plaintiff had a right to sign judgment and sue out execution. Cockburn, C. J.: It appears that a slip was actually signed and issued, according to the practice of insurers; and one is happy to think, for the credit and good position of such persons, that they never fail to meet a proper claim when that has been done. But if I am asked whether such a proceeding amounts to an insurance according to the terms of this agreement, I must say that it does not. It is clear that such an engagement by the underwriter could not be enforced at law, and therefore I come to the conclusion that the ship was not kept insured, and that there was a breach of the agreement. It is not for me to say whether a court of equity would interfere or not.—(*Parry v. the Great Ship Co. (limited)*, 33 L. J., Q. B. 41.)

MARINE INSURANCE.—A policy of insurance was effected on a ship from Lyons to Galatz, warranted to sail on or before a certain day. The ship left Lyons before the day in question fully equipped for the river voyage, but with only a river captain and crew, and without her masts, anchors, and other portions of her tackle which were necessary for her sea voyage. She could not possibly have made her river voyage with her masts up and her heavy tackle on board, and it was usual in similar adventures to take these and other things necessary for the sea voyage on board at Marseilles. The required additions were in this case made at Marseilles without unreasonable delay, but the ship did not leave Marseilles until after the day appointed; yet it was held, looking to the nature of the voyage and to mercantile usage, that the ship had complied with the warranty to sail on a certain day, and with the implied warranty of seaworthiness. A vessel, having a reasonable excuse for delay in the course of her voyage in order to make certain alterations in her equipment, increased the delay by waiting for other ships which were about to perform the same voyage, in order that she might sail in company with them. The jury found that a prudent captain would have followed this course; and it was held, the delay was justifiable on this ground.—(*Bouillon v. Lupton*, 33 L. J., C. P. 37.)

PLEADING.—To an action by executors for salary due to their testator, as clerk to certain commissioners, a plea—that the commissioners never had, at or since the accruing of the debt, funds applicable to the payment of the claim, and that they had applied according to the Act all monies which had come to their hands as such commissioners, except a small sum set apart by them to satisfy certain other claims which accrued long after the plaintiffs' claim—was held, on demurrer, to be no answer, for that the plaintiffs were entitled to judgment, whether payment could be enforced or not. Bramwell, B.: But the plea is not what the defendants supposed it to be. It says this: that the commissioners have had no funds in hand at or since the time of the accruing of the debt applicable to the payment of it, that they have duly collected all rates which they were authorized to collect, and that they have duly applied all such sums

according to the Act, except a small sum which they have set apart to satisfy certain claims which have arisen since the accruing of the plaintiffs' claim. The plaintiffs might answer, 'You ought to have levied a rate: at all events you can give us the small portion which you admit you still have applicable to our claim; you should have set this money aside for the payment of our debt first of all.' The defendants' plea seems to me very like this, that they do not owe the plaintiffs this money, because they have determined to pay somebody else with their funds.—(*Bush v. Martin*, 38 L. J., Ex. 17.)

PRINCIPAL AND SURETY.—Defendant, as surety for his son J., executed a bond to an insurance company. The condition, after reciting that J. had been appointed by the company to be an agent of the company at Adelaide, and that it had been agreed the defendant should enter into the said bond for securing the fidelity of J., made void the bond if J., his heirs, etc., should pay all monies received by him on account of the company, and should honestly conduct himself in his said office of agent to the company. The facts existing at the time of giving the bond were these: F., the company's agent at Adelaide, being about to take the defendant's son J. into partnership, requested the company to associate J. with him in the agency, and the defendant was asked to execute the bond by a letter which informed him that such bond was necessary if his son was to be associated with F. in the agency, but that as it was only insuring the integrity of his son, it was a nominal thing. After the bond was executed, J. entered into partnership with F.; and it was held, defendant was not liable on the bond for monies of the insurance company received by the firm of F. and J. as such agents, since, even if the surrounding circumstances which existed at the time the bond was executed could be inquired into in construing the bond, the above facts did not show an intention to make the defendant responsible for the acts of any other person than his son. And *semble*, that the co-existing circumstances might be looked at in putting a construction on the bond.—(*Montefiore v. Lloyd*, 33 L. J., C. P. 49.)

WAGERING CONTRACT.—If a broker be employed to make wagering contracts, illegal under 8 & 9 Vict., c. 109, s. 18, and at the request of his principal pays the amount due under such contract, he can recover the amount so paid from his principal; and the illegal nature of the contract with reference to which the money is paid is no defence to an action founded on such a claim. Erle, C. J.: If a party lose a wager, and requests another to pay it for him, he is liable to the party so paying it for money paid at his request. I also think that if, according to the custom of brokers in a particular trade, a broker had authority to pay the amount due from his principal under the contract, that would be a continuing request by the principal to the broker to pay the money on his account, so as to render the principal liable to reimburse him. If the principal were to direct the broker not to pay what was due under the contracts, and it appeared by the rules of the market where the transaction took place, the broker was liable to pay in default of the principal doing so, then a question might arise as to what was the position of the principal with regard to the broker; but that is a question which it is not necessary now to decide.—(*Rosewarne v. Billing*, 33 L. J., C. P. 55.)

WILL.—Testator, at the date of his will, 1802, had two legitimate sons, G. the elder, and B. the younger, and two illegitimate children, a son W., the plaintiff, and a daughter J. By the will he devised an estate, subject to certain annuities, to trustees, to the use of his second son B. for life, remainder to the sons and daughters of B. successively in tail, remainder to his eldest son G. for life, remainder to the sons and daughters of G. successively in tail, remainder to his natural son W., the plaintiff, remainder in fee to his friend T. Amongst the annuities was one of L.21 to W. the plaintiff, and one of L.5 to his natural daughter J. G. died in 1806 without issue. T., the remainderman in fee, died in 1818. The testator, in 1819, by a testamentary instrument, which he therein declares to be a *codicil to be added to and taken as part of his will*, gave to the

plaintiff W. a further sum of L.21 annually, in addition to the L.21 left to him by his said will; and he gave to his natural daughter J. a sum of L.10 per annum; and after the bequests he gave to his second son B. 'all his estate and property of every description whatever, after discharging the above legacies.' The testator died in 1820. B. died, seised, in 1861, without issue. The present plaintiff, W., then claimed the property under the estate devised to him by the will of 1802. In ejectment by W. against B., it was held, that as the codicil did not show clearly that the testator intended to revoke the life estate given to the plaintiff by the will, the plaintiff was entitled to recover possession, in accordance with the principle, that the intention to revoke must be equally clear and free from doubt with the original intention to devise.—(*Robertson v. Powell*, 33 L. J., Ex. 34.)

EMBEZZLEMENT.—A committee formed of the members of two friendly societies for the purpose of conducting a railway excursion, appointed certain persons to sell the excursion tickets to the members of the societies; and the money received from the sale of the tickets was to be paid over to a specified person, and was to belong to the two societies in certain proportions. The prisoner, who was a member of the committee, was one of those nominated to sell tickets, and a certain number of tickets were entrusted to him by the committee to sell, without any remuneration for his services. Of these he sold some, but instead of paying over the sum received for the sale, he fraudulently appropriated it to his own use; and it was held, the prisoner was not liable to be convicted on an indictment charging him as servant to the other members of the committee with embezzling their monies.—(*R. v. Bren*, 33 L. J., M. Ca. 59.)

GAME.—Proof that defendants were found together on a highway at six o'clock A.M., with bags containing one hare and several rabbits, and with nets and stakes, is evidence upon which Justices may convict them, under 25 & 26 Vict., c. 114, § 2, of having obtained the game by having been unlawfully on land in pursuit of game, or of having used the nets for the purpose of unlawfully taking game, without direct proof that any of the defendants had been upon any land, or had used any of the nets. Cockburn, C. J.: There are then two offences with which the person may be charged, and, on proper proof, convicted: viz., either of having obtained the game, by having been unlawfully on land in pursuit of game, or of having used the nets or other articles for unlawfully taking game. As to the first class, the difficulty would in most cases arise of being able to point the proof at any particular land; and I therefore agree with what Erle, C. J., said in *Brown v. Turner* (7 Law Times, N. S. 681; since reported, 32 L. J. (N. S.), M. C. 106, 13 Com. B. Rep., N. S. 485), that such proof is not necessary. But in the present case the magistrates might have convicted of the other offence, without embarrassing themselves with the question of land; for in the second branch of the section, the offence is the unlawful use of the instruments for taking or killing game, without any reference to land. And when persons are found at an early hour in the morning with game and nets in their possession, unless they give a satisfactory account of how they came by the game, it is but reasonable to conclude that the nets had been unlawfully used to take game.—(*Evans v. Botterill*, 33 L. J., M. C. 50.)

CONTRIBUTORY.—J. C. took 300 shares in a cost-book mining company; and in order to increase the apparent number of shareholders, and thereby cause the mining scheme to be more favourably regarded in the share-market, caused 100 of them to be transferred into the name of A., and 100 to be transferred into the name of B., who, notwithstanding the transfers, neither attended meetings, nor paid calls, nor took any part in the affairs of the company; and it was held, that having regard to the absence of any *bonâ fide* trusteeship on the part of A. and B., and to the extended definition of the word 'contributory,' in the 200th section of the Companies Act, 1862 (25 and 26 Vict., c. 89), J. C. was properly

inserted on the list of contributories in respect of the whole 800 shares.—(*Wheat Emily Mining Co. (Cox's Case)*, 33 L. J., Ch. 145.)

LEGACY.—Testator, by will, gave the residue of his property equally to all and every the children of R. B. and B. B. who should be living at his decease, and to ten other persons by name; and one of the latter having died in the testator's lifetime, it was held the ten persons named were not members of a class, and that the share of the deceased legatee lapsed.—(*In re Chaplin's Trusts*, 33 L. J., Ch. 183.)

LEGACY.—Testator, by his will, directed that his trustees should stand possessed of the residue of the proceeds of the conversion of his real and personal estate after payment of legacies upon trust as to one-third for F. B. for life, with remainder to his children who should attain twenty-one, as tenants in common; and if there should be no such child, the testator directed, that on the decease of F. B., the same trust-moneys should sink into and form part of his residuary real and personal estates, and be held and applied accordingly. Testator gave the other two-thirds to other persons: F. B. died without children. It was held, there was an intestacy as to the one-third given to F. B. for life. The decision in *Humble v. Shore* approved. Wood, V. C., said that he thought the decision in *Humble v. Shore* (7 Hare, 247) was right. It was impossible to hold that the words, 'to be held and applied accordingly,' amounted to a gift: those words meant no more than the law would imply, and were mere surplusage. If the testator intended to give this share to the other legatees, it was easy for him to express that intention. The Court could not go so far as to say, that because there was an ambiguity, a gift over to the other legatees must be implied.—(*Lightfoot v. Burstall*, 33 L. J., Ch. 188.)

PRINCIPAL AND AGENT.—L., a broker, was introduced to P. and Co. by A., and was at the interview directed by P. and Co. to make purchases under the superintendence of A. Thereupon L. made large purchases under the sole order and direction of A., sending him the bought and sold notes and contracts, and receiving from him the necessary monies for payments, and generally treating him as principal, no direct communication taking place between L. and P. and Co.; and such course of dealing was admitted by P. and Co. to have been according to their intentions up to a certain period; and no notice was given by them to L. of any determination of the authority of A. It was held (by the House of Lords), affirming the decision of the Master of the Rolls (Lord Cranworth dissenting), that L. had a right, from what took place at the interview, and the uniform course of action on the part of A., to consider him as the authorized agent, or a partner of P. and Co., until expressly informed of the determination of his authority or of the partnership. Lord Cranworth: My Lords, before I examine in detail the facts of this case, I desire to advert very shortly to one or two general propositions connected with the law of agency, which, I think, were sometimes lost sight of in the argument of this case at your Lordships' bar. First, then, as to the constitution by the principal of another to act as his agent. No one can become the agent of another person, except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only by the will of the employer that an agency can be created. This proposition, however, is not at variance with the doctrine, that where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though, in fact, no agency really existed. It is, however, necessary to bear in mind the difference between this agency by estoppel, if I may so designate it, and a real agency, however constituted. Another proposition to be kept con-

stantly in view is, that the burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise, that the principal is estopped from disputing it. . . . It was argued, that in a case where a firm, acting through an agent, employs a broker to buy and sell in the market for them, and that practice has continued through many transactions, then the broker, dealing with the agent, has a right to assume the agency, to continue until something has been done to revoke it. I do not concur in that as a correct exposition of the law. So far from it, I do not think that the previous dealings could without more be admitted even as *prima facie* evidence of agency in subsequent transactions. If a merchant constitutes any one his general agent for buying and selling in the market, either through a particular broker or otherwise, then, until revoked, the agency will continue, and the principal will be bound by his acts; and further, the fact that such general agency once existed would be admissible as *prima facie* evidence of its continuance. The burden would be on the principal to show that it had been determined. But unless there is proof either that the agency is a general continuing agency, to endure until revoked, or that the agent fills some character from which such a general agency may be presumed, the fact that there had been separate agency in any number of previous cases, affords no evidence of agency on any subsequent transaction, however closely it may resemble all which have gone before.—(*Pole v. Leask*, 33 L. J., Ch. 155.)

SPECIFIC PERFORMANCE.—Testator gave real and personal estate to trustees upon trust for sale, and declared that no sale should be made without consent in writing of his sons and daughters. The proceeds of sale were to be held in certain shares upon trust for the sons and daughters and their issue, with ulterior trusts. It was held, by the Master of the Rolls, that a contract entered into by the trustees after the decease of one of the daughters, could not be specifically enforced, and that for want of her consent the trustees, notwithstanding the concurrence of the person absolutely entitled to her share of the proceeds, could not make a title; and, on appeal, the Lords Justices affirmed that decision, considering that the title was open to too serious a doubt to be forced upon a purchaser.—(*Sykes v. Sheard*, 33 L. J., Ch. 181.)

COMPROMISE.—In 1860 a wife filed a petition for dissolution of marriage on the ground of adultery and cruelty. When the cause came on for trial it was withdrawn from the jury by agreement of the parties, the petitioner undertaking not to institute other proceedings in the Divorce Court. In 1863 the wife instituted a fresh suit for dissolution of marriage on the ground of adultery and cruelty, the acts of misconduct alleged in the petition being, with the exception of some acts of adultery of later date, the same as those charged in the first petition. The respondent pleaded the agreement in bar. Upon application by the petitioner for directions as to the mode of trial, the Court refused to make any order, upon the ground that the institution of the second suit was a gross breach of good faith, and a violation of the agreement by which the petitioner had surrendered irrevocably any legal right to relief in respect of misconduct charged in the first petition.—(*Rowley v. Rowley*, 33 L. J., Fr. and M. 54.)

MARRIAGE.—In a suit for dissolution of marriage, it appeared that the petitioner and respondent had lived together for five years in Virginia, and were received in society as man and wife: that by the law in force in Virginia, when the cohabitation began, no religious ceremony was necessary to the validity of a marriage, nor was any registry of marriages required to be kept; and that in consequence of war in Virginia, the record of any religious ceremony which might have taken place could not now be obtained. It was held, there was sufficient proof of the marriage.—(*Rooker v. Rooker*, 33 L. J., Fr. and M. 42.)

SALE.—In a bill of sale, the grantor was described as 'James Robert Veal, of No. 25, Bernard Street, Russell Square, in the county of Middlesex, gentleman.'

In the affidavit filed therewith, pursuant to 17 & 18 Vict., c. 36, § 1, he was described in the same way. The description of his residence was correct, but he was in reality, at the time of giving the bill of sale, in the employ of C. and Co., of Watling Street, in the city of London, as a buyer of silk. It was held, the bill of sale was invalid, by reason of this description being incorrect.—(*Adams v. Graham*, 33 L. J., Q. B. 71.)

DEBTOR AND CREDITOR.—By a composition deed between a debtor of the first part, his surety of the second part, and the several persons, creditors, whose names and seals were set and affixed to the schedule, and all other the creditors of the debtor, of the third part,—reciting that the creditors, parties to the deed of the third part, did approve of the debtor's proposal to pay his creditors a composition of 7s. 6d. in the pound, by two instalments, secured by the surety, and that bills of exchange drawn by the surety upon and accepted by the debtor had been delivered to the creditors,—it was witnessed that the creditors, parties thereto of the third part, covenanted with the debtor, that unless and until default should be made in meeting the said bills, the said creditors would not sue or molest the debtor; and further, that if any of them, the said creditors, should break or contravene the said covenant, then the debtor and his estate and effects should be thenceforth absolutely released and discharged from all and singular the debts, claims, and demands of the creditor, and the deed should operate as a defeasance pleadable in bar, or might be otherwise set up as a defence to any action theretofore or thereafter brought by such creditor. It was held, the last-mentioned covenant vitiated the deed; and that, therefore, although the deed was executed and registered in conformity with the Bankruptcy Act, 1861 (24 & 25 Vict., c. 134), it was no answer to an action by a non-executing creditor for the amount of his debt.—(*Dell v. King*, 33 L. J., Ex. 47.)

GUARANTEE.—A., wishing to be allowed from time to time to overdraw his account with his bankers, the plaintiffs, the defendant gave them the following document: 'On demand I promise to pay to Messrs G. and Co. (the plaintiffs) L.300, with interest on same, to secure an advance now or hereafter on a banking account with A.' A. became insolvent, and paid, by agreement with his creditors, a composition of 16s. in the pound; and the plaintiffs, who had advanced much more than L.300, received the dividend on their whole advance, leaving a balance on the whole of more than L.300. It was held, the promise by the defendant was to repay an advance of L.300, and that he was therefore only liable for the balance of L.300, after deducting 16s. in the pound from that amount.—(*Gee v. Pack*, 33 L. J., Q. B. 49.)

GUARANTEE.—By instrument in writing, in consideration of plaintiffs' execution on a judgment against a third person being stayed until a certain day, defendant undertook to pay the debt and costs if not then paid by the principal debtor; and plaintiffs, in consideration of the undertaking, agreed to stay execution until the above-named day if defendant gave to W. satisfactory references as to his ability to pay the amount, but not otherwise; and if the references were not satisfactory, then the guarantee was to be given up within a week from that date. An action having been brought on that instrument, it was held, that, even if the giving of references was a condition for the benefit of plaintiffs, which they could renounce, it lay upon them (the references being unsatisfactory) to show that they had renounced the condition, and had elected to treat the instrument as in force. Therefore a plea that the references were not given and were not satisfactory, and thereupon defendant requested plaintiffs to give up the undertaking, and they refused, and defendant became and was discharged from performing it, was held an answer to a declaration on the undertaking.—(*Morten v. Marshall*, 33 L. J., Ex. 54.)

THE

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CONDUCT OF PARLIAMENTARY BUSINESS—SIR JAMES FERGUSON'S MOTION.

THE principle that Government is bound to find employment for any section of the community; or, conversely, that their want of occupation is a grievance for which the unemployed are entitled to hold the Government responsible, is now so universally discountenanced in this country, that it would be difficult to find any member of Parliament—or, indeed, any person of influence in the country—who would undertake to support it. It may be that the Legislature, while throwing upon the private citizen the burden of finding himself an employment, has reserved to itself the sole privilege of invoking the paternal care of Government in the transaction of its own business. At any rate, complaints (of which Sir James Ferguson's recent motion was an expression) have been made that the business of legislation is at a stand-still, and that the Government is in fault in not being prepared to develop its measures in sufficient time to admit of their being fully discussed, and that measures which ought to be discussed are not tabled at all.

The neutral tone of this Journal in relation to politics relieves us from the necessity of considering Sir James Ferguson's motion in its personal or political bearings. The explanations tendered by the Lord Advocate in the House of Commons must have satisfied the Scotch members that his Lordship is in the habit of devoting to his Parliamentary duties at least as large a share of his time and attention as his predecessors have been in the habit of doing. It is known in Edinburgh that the Lord Advocate is rarely at the bar of the Court of Session when Parliament is sitting, and then only when tempted by an invitation to take part in a case of unusual

value or importance. But with the personal aspect of the question it is quite unnecessary that we should deal, while its aspect in relation to party politics is too trifling to deserve the interest it has excited. On the other hand, Sir James Ferguson's motion suggests an inquiry on some important topics: (1) as to the alleged diminution in the number of important measures submitted to Parliament and passed into law; (2) the constitutional duties of the Government in relation to the Legislature; and (3) as to the distribution of the Parliamentary business of Government amongst its different departments.

It is generally admitted that legislation forms but a small part of the functions either of the Parliament or of the Administration. But the observation cannot be understood in its full force except by those who have actually looked into the volumes of the statute-book with the view of analyzing their contents. It is very obvious, if not self-evident, that the Queen's Government could not be carried on without constant recourse to the authority of Parliament; and that authority, whether required for the purpose of raising or appropriating money, creating offices, or regulating the administration of the public departments, is necessarily expressed in an Act of Parliament. But this is not legislation in the ordinary sense of the term. It is mere administration. The Parliament plans, or sanctions the plans submitted to it; the Executive carries out these plans: but the duties of both are of the same character. Of legislation, as involving new laws which are to affect the people directly, and not merely by the action of the Executive upon the people, we have less and less every year, though many are of opinion that we have too much. Far from being a subject of regret, this is really the highest result of provident legislative action in times past. If the amendment of the laws advances in accordance with the dictates of an enlightened jurisprudence, and if the interpretation of the Acts of the Legislature is guided by the same liberal spirit, a time must come when the positive law of the country is found to satisfy the requirements and wishes of the people, and when legislation, in the sense of *law-making*, is no longer needful. To show how inconsiderable is the proportion of Acts in the nature of proper *legislation* as distinguished from Parliamentary administration, it is necessary, as we have said, to classify the contents of the statute-book; and as that has already been done to some extent by the Statute Law Commissioners, our estimate shall be based on their classification,

the principles of which are explained in the report prefixed to their Register of the Public General Statutes (7th July 1859). The classification is not, on the face of it, a very logical one; but we gather from the report that it is framed upon the plan of successive differentiation: Class I. being first selected from the whole, Class II. from what remain, etc. The classes are as follows:—

- I. Armed Forces.
- II. Revenue.
- III. Finance.

Other Acts are divided into

- IV. Acts relating to the United Kingdom.
- V. " " Great Britain.
- VI. " " England and Ireland.
- VII. " " England.
- VIII. " " Scotland.
- IX. " " Ireland.
- X. Local and Special Acts (which are subdivided into 5 sub-sections).
- XI. Acts relating to the Colonies.
- XII. " " East Indies.
- XIII. " " Suppression of the Slave Trade.

According to the principle of this classification, every Act in the nature of a permanent amendment of the laws of any part of the United Kingdom must fall within one of the Classes IV. to IX. But as the laws of England, Scotland, and Ireland are dissimilar, it will be found that, in practice, measures of law reform are almost invariably restricted in their operation to one of the three divisions of the United Kingdom, and must therefore be classed under the divisions VII., VIII., and IX. A cursory inspection of the register confirms this view, which might have been assumed from the known tenor of legislation. We have counted the Acts labelled VII., VIII., and IX., in the register for the first five years of the present reign. The sum of the three classes of Acts for five years is just 132. The total Public General Acts for these years amounts to 525. The proportion is therefore as 1 to 4.

But the 132 Acts relating to England, Scotland, or Ireland exclusively, must be greatly reduced if we wish to confine our attention to measures of permanent and general utility. Class VII. includes, in the first year of the present reign, Acts relating to Queen Anne's Bounty, Houses for residence of Clergy, Amendment of ditto, Bishopric of Sodor and Man, Investment of Suitors'

Money in the Courts of Chancery and Exchequer, Special Constables, Parkhurst Prison, Public Records, Residences of Clergy (the third Act in one year), and many others of the like description. We may safely reduce the number by one-half, to eliminate measures of local or transitory interest, from which there results the number of 65 Acts for five years, or 13 per annum, as the permanent addition to the legislation of the United Kingdom, on an average of five years, selected without reference to the present condition of Parliamentary business.

It appears, then, upon a comparison with a former, and that not an inactive term of legislation, that the value of the labours of the present Parliament has not been fairly estimated. Setting aside the mere routine business, the voting of supplies, and the appropriation of the estimates,—the interpellation of ministers, and the discussions on Parliamentary reform, the ballot, church rates, and other political questions,—we have, as the fruits of the Parliamentary sittings, in addition to the important and eminently successful financial measures inaugurated by Mr Gladstone, a body of statutes applicable to the different laws in operation in the United Kingdom, comprised in the last five volumes of the statute-book, certainly not less numerous and important, we venture to think much more so, than those of the five years with which we have compared them, and equal in importance to any similar period that may be selected at hazard. The additions to the permanent statutory code for this part of the kingdom certainly exceed the quotient of four or five Acts per annum, which our examination of the register would assign as the average of legislation for each division of the United Kingdom; and we believe that in point of utility they will bear comparison with the legislation of any commensurate period.

The *second* topic of inquiry suggested by Sir James Ferguson's motion, involves the consideration of the duty which the Government owes to the Legislature, in regard to the initiation of measures. It may not be possible to reduce to fixed rules duties so undefined as the Parliamentary functions of members of the Government; but there are certain branches of legislation which are obviously within their province, while there are others which, in certain circumstances, lie as clearly beyond it. It is, of course, the duty of each member of the Administration to introduce and to take charge of bills necessary for regulating the duties of his department, or for giving legal effect to the resolutions of the Government in matters

pertaining to that department. Bills connected with the organization of the army and navy fall to be brought in by the heads of the military and naval secretarial departments; revenue bills must issue from the portfolio of the Chancellor of the Exchequer; colonial administration should originate with the Secretary for the Colonies; criminal law bills, and bills relating to the property of the Crown, with the Attorney-General or Lord Advocate. Some of the measures we have named cannot competently be introduced except by the ministers of the Crown; others of them may be competent to private members, though few would care to undertake the responsibility of introducing them;—all are Government measures in their substance, and according to the practice of Parliament.

There is another class of legislative measures, the responsibility of which properly devolves upon Government on account of their importance, although not pertaining to the business of any department. We mean bills embodying important constitutional changes, such as projects of Parliamentary reform, or bills affecting the constitution or temporalities of the Church, or for effecting any important alterations on the judicial establishments of the country. Such bills involving, as they usually do, a grant of public money, cannot be brought in without the consent or recommendation of the Crown. This provision gives Government the control of all the larger matters of legislation, and confines the Opposition to their legitimate functions of criticism or antagonism.

All legislation respecting social and legal reform, provided it does not interfere with the financial plans of the Administration, is as open to private members as to official members; and private members' bills, if favoured by Government, are often more likely to pass than they would have been if introduced by the Government itself, being either unopposed, or if opposed at all, then only on their demerits, real or supposed, and not from political motives. The same observation applies to bills having only a local operation, although in form public. Political measures of minor importance, when introduced by private members, serve the purpose of forcing the subject on the attention of the Administration; but unless taken up by it, and made Government measure, they can scarcely escape shipwreck at some of the dangerous stages.

From these considerations, it may fairly be deduced that the principal part in the initiation and promotion of legislation is, and must be sustained by the members of the Government.

But it is not therefore to be inferred that it is the business of the Government to attempt to lead public opinion by introducing measures for which the country is not prepared. In the ignoring of this distinction lies the fallacy of critics like Sir James Ferguson and Mr Smollett, who seem to think that the business of Government is to provide occupation for Parliament, by preparing for its consideration tentative reforms in every branch of the social organization. A Government which should act on this view of its relations with the Legislature, would not long retain the confidence of that body. The first suggestion of new measures should come from the Parliament itself; not necessarily in the shape of projects of law, but expressed in resolutions, or indicated in motions for inquiry or information. When public opinion has been distinctly pronounced that our institutions need amendment, it will then be the duty of the Government to consider what sort of amendments are likely to give satisfaction by their results; and, if their political programme is not inconsistent with the undertaking, to embody the required amendments in a bill for the purpose of being submitted to Parliament.

We readily admit that there are subjects upon which it is convenient that Government should take the initiative. Every Government, for example, must have a financial policy, whether the public has one or not; and the success of many of the most important financial measures has depended on the observance of perfect secrecy with respect to the intentions of the Chancellor of the Exchequer up to the moment when these were declared, and when the authority of the House of Commons was obtained for carrying them into immediate effect. Departmental legislation must proceed independently of popular or Parliamentary influence, otherwise there never would be any legislation of the kind. Legal reforms rarely command any great public support. Many have been carried through of late years, of which the public knew nothing, and which it would not have understood if it had known. But in this class of measures, the opinion of the legal profession, assuming that the profession have no personal interests opposed to those of the public, supplies the place of an intelligent sympathizing or criticising public. As a general rule, it is of little use attempting to legislate on law in advance of the opinions of the legal profession, or the more intelligent among them.

These considerations go far to answer our third inquiry, whether the Parliamentary business of Government may be facilitated by a better distribution among its members, or by the creation of an addi-

tional secretarial department. Although the Parliamentary business of the Home Department is considerable, if tested by the number and length of the bills which are annually introduced under its auspices, it may be observed that the greater part of these are of a formal character, that they attract little attention, and provoke no opposition. The bills which embrace amendments in the law, such as may claim the serious consideration of the Legislature, are, as we have seen, few in number—a dozen or fifteen in the year on the average. They are not generally made party questions; and even when the Opposition do show fight in committee, a little concession will generally induce them to join in discussing such measures on their merits. On the whole, we incline to think that the Parliamentary labours of the Home Secretary are lighter than are generally supposed; and we do not perceive the necessity of relieving him of a part of his work by the creation of a new office, which, besides, it would be difficult to fill, in the present dearth of official and administrative talent.

What we have said respecting the legislative duties of the Home Secretary, may be affirmed with even greater confidence of the business pertaining to the Lord Advocate's department. Strictly speaking, his legislative duties are confined to the promotion of measures of law reform; and if the Attorney-General of England is able, while carrying on a leading practice in the Common Law or Equity Courts, also to attend to Parliamentary business of the same kind, there is no reason to suppose that the Lord Advocate, whose practice while in London is necessarily confined to the House of Lords, should feel unable to command sufficient leisure for carrying his bills through Parliament. It is true that, in consequence of the differences which exist between English and Scotch institutions, the Lord Advocate has occasionally to take charge of measures which, if they were applicable to England, would not fall within the department of the Attorney-General. But this is merely an arrangement of convenience, because the Lord Advocate, being a Scotchman, is supposed to understand Scotch subjects and to know the opinions of the people of Scotland better than the English minister, to whom the charge of the measure would otherwise have fallen. If an Under-secretary of State were appointed for Scotland, it would not make the least difference in practice: the Government would still be forced to rely upon the superior professional knowledge and Parliamentary influence of the Lord Advocate for effective

support; and the representatives of the public out of Parliament would easily discover who was the really responsible minister, and would place themselves in communication with him rather than with the nominally responsible Under-secretary.

It must be admitted that the arrangements for the conduct of Scotch business in the House of Lords are not altogether so satisfactory as might be wished. Under the present Administration, many of the Lord Advocate's bills are entrusted, in the House of Lords, to the Duke of Argyle, who holds an office the Parliamentary duties of which are of the lightest. Bills of a strictly legal nature are entrusted to the Lord Chancellor. It must be observed, however, that the Lord Chancellor, whose position and eminence as an English lawyer give weight to his recommendation of English measures, is not always equally qualified to take an active part in Scotch legislation; and to the reasons which some years ago induced a committee of the Upper House to recommend the creation of a Scotch Peer as a judge of Appeal, it may be added that the individual holding that position would, from his eminence as a Scotch lawyer, be able to render valuable assistance to the House in the business of legislation. Any Government which should revive the office of Lord Chancellor for Scotland, with a seat in the House of Lords, would confer a great boon upon the country. The House of Lords, which, with all its faults as a judicial institution, is still the ablest, and therefore the best, Court for the determination of important questions of legal principle, has of late years lost ground in the confidence of the profession in Scotland. This revulsion of feeling is attributable in some measure to the want of consideration which the English lords sometimes evince for the opinions of the judges of the Court of Session; but it also denotes a growing conviction that the administration of our law, in the ultimate resort, cannot safely be entrusted to a Court which does not contain a single member professionally conversant with the law of Scotland. There can be no doubt that the profession in Scotland would approve of the elevation of a Scotch judge to the Appellate Court. A few years ago it was understood that overtures had been made to one of the most distinguished of our judges with a view to his retirement upon a pension, with the honour of a peerage, but that the offer had been declined. It is possible that there were circumstances connected with the declination which preclude the Government from renewing it; but, if necessary, a new office might be

created, and might be so endowed as to ensure its acceptance by men of the highest position in the profession ; and we are certain that such an addition to the available judicial and legislative strength of the Upper Chamber would be of infinitely greater public utility than any assistance that could be provided for the discharge of the Lord Advocate's duties in the House of Commons.

THE GENERAL ASSEMBLY AS A COURT OF REVIEW.

THE quiet monotony of the Edinburgh summer is annually enlivened, by the interest and excitement attending the meeting of the General Assembly of the Established Church. During its ten days' session, the ordinary subjects of conversation are forsaken for discussions on the speeches and decisions of the Supreme Ecclesiastical Court ; the streets are more crowded, and the newspapers more unwieldy, than at almost any other season of the year. While the attention of the public generally is turned in this direction, the partly judicial character of the Assembly, and the fact that lawyers are usually entrusted with the conduct of the 'causes' which come before it, naturally attract the notice of members of the legal profession to its proceedings.

A large portion—perhaps the larger portion—of the business which is brought before the Assembly, relates to matters which are not within the province of the *Journal of Jurisprudence*. The Reports of the various Committees, and the Overtures from Presbyteries and Synods, deal, for the most part, with subjects with which we do not desire to intermeddle. That they are in the best hands, and that they are well and ripely considered, we do not doubt; and, at all events, the suggestions of a legal periodical are not likely to have much weight attached to them, when it ventures to trespass beyond its own domain on what is ecclesiastical, if it may not be called sacred, ground. Some subjects, it is true, which are dealt with by the committees of Assembly, may fairly be supposed, if we are to judge from their names, to have a *quasi* legal character. The report of the 'Committee on Unexhausted Teinds,' for example, may very probably be a document of great value to any student who, ambitious of making himself one among a thousand of his race, desires to explore the *terra incognita* of Teind Law. Nor is it altogether unlikely that the report presented by the 'Committee on the Immorality of Rural Districts'

may contain suggestions of great practical utility in the conduct of a class of cases with which some Sheriff Courts are painfully familiar. But however this may be, and however important the proceedings of the Assembly undoubtedly are when it acts as a *legislative* body, its work in the making of new laws, and the mending of old ones, does not possess so much immediate interest to lawyers, and is not so fit a subject for observation in these pages, as the mode in which the Assembly conducts itself in its *administrative* capacity, and when it is, in the proper sense of the words, 'a Church Court.' Questions of relevancy, of the competency and import of evidence, of the constitution of the judicatory, and many others of a strictly legal nature, are yearly brought under its notice, are argued before it by lawyers on legal grounds, and are decided with avowed reference to legal principles. It seems therefore not altogether out of place to consider whether, in these and similar respects, the General Assembly, in the exercise of its *judicial* functions, employs the machinery best fitted for ascertaining the truth in the causes which it tries, and has reduced the chances of a miscarriage of justice—to which all courts are liable—to that *minimum* of risk which most people are willing to admit is secured by the modes of procedure in use in the Supreme Civil Courts of the country.

Before doing so, it is perhaps proper to remark that the forms adopted by the General Assembly, acting as a judicial body, are precisely similar in many important respects to those followed in the inferior Church Courts; and that, therefore, some of the remarks which follow have an equally direct bearing on Presbyteries and Synods as on the Assembly. We propose in the first instance, however, to take the usual course followed in an appeal from the sentence of an inferior judicatory, pronounced in a libel which has been duly found relevant, and in which evidence has been led, as affording the clearest example, in the mode in which it is conducted, of certain peculiarities of procedure which seem to call for amendment or abolition.

To begin with what seems unobjectionable. The mode in which the materials for judging in an appeal are in its first stage laid before the members of Assembly, does not present any features essentially different from those of our ordinary procedure in the Supreme Civil Court sitting as a Court of Review. By No. 17 of the Standing Orders, it is enacted that, 'in cases brought up to the General Assembly by reference, complaint, or appeal, *the said reference, com-*

plaint, or appeal, together with the record and the evidence adduced, shall be printed' in sufficient numbers to afford a copy to every member of Assembly. It is also provided by Order 19, that, when the appeal is merely upon a point of law or relevancy, it shall only be necessary to print such portions of the evidence as the parties may respectively judge necessary. The Court of Appeal seems thus to be placed, as nearly as may be, in the position of the Court whose sentence it is to review,—the disadvantage arising from not hearing and seeing the witnesses being, in the circumstances, unavoidable.

But the Assembly is put in possession of the record and the evidence, only as auxiliary to the oral pleadings to which it is next called to listen. The appellant and respondent do not merely ask the Assembly to read the libel and pronounce on its relevancy, and to wander through voluminous evidence and come to a conclusion on its scope and bearing, but each party must be heard thereon by himself or by his counsel. The first question then to be disposed of is, in the majority of cases, the relevancy of the charge; and at this stage we are met by an anomaly of a most startling nature. I am libelled, let us suppose, with a certain named offence, of which I am alleged to be guilty in so far as, on a specified date, I did certain acts or spoke certain words. My plea in the Presbytery has been, that the libel is irrelevant in its major or its minor proposition; in other words, that the alleged offence is not an offence, or (it may be) that the facts averred against me would not, if proved, constitute the offence libelled. Now, let us see by what rule the Church Courts must be guided in deciding such a plea. The Form of Process enacted by the Church in 1707 is the authority which must be deferred to in all questions relating to scandals and censures; and its definition of what is relevant matter for libel is in these somewhat broad terms: '*Nothing ought to be admitted by any Church judicature as the ground of a process for censure, but what hath been declared censurable by the Word of God, or some act or universal custom of this National Church agreeable thereto.*' That which the Assembly thinks the Word of God has declared censurable, shall be relevant matter of libel; and the opinion of the Assembly is, in other words, the interpretation put by a majority of the members of that body upon certain passages of Scripture. The result may be, that although I and 150 ministers and elders of the Church conscientiously interpret in one fashion, yet, as 160 interpret differently, I am liable to the pains of discipline. Can

it be said that this is a safe or an expedient mode of settling a question of such delicacy?

When an Act of Parliament is prepared, the fact that its provisions will be carried out, and its enactments enforced by judicial tribunals, is expressly kept in view by its framers; and, in order to leave as little room as possible for mistake as to its true meaning, it is sent forth by the Legislature furnished with elaborate sectional divisions, interpretation clauses, and those other safeguards in expression and arrangement with which lawyers are familiar. If, notwithstanding these precautions, its signification is found by experience to be doubtful, or its provisions conflicting, an amending statute is passed, and the course to be followed by the administrative tribunals in putting it in force is so plainly defined, that mistake is rendered at least unlikely. But who ever heard of entrusting the interpretation of an Act of Parliament, in which the risks of false interpretation have been so carefully eliminated, to a large body of men, of whom very few have had any previous training to fit them for the work? Nay, who ever heard of submitting the meaning of a statute even to the limited numbers of an ordinary jury? And yet, what in civil matters would be thought monstrous in reference to a document carefully mapped out and defined to the very end that its interpretation may be free from doubt, is done in things ecclesiastical, and in regard to a work of such delicacy and difficulty as the interpretation of the Bible.

It is true that in many cases the relevancy of a libel cannot be open to much doubt, as where the charge is of a criminal nature, or of great heinousness, such as impurity or intoxication. But can it be said that there are no instances in which opinions will be arrived at, by the members of such a body as the Assembly, widely various, and yet all equally conscientious, in regard to what has, and what has not, been 'declared censurable by the Word of God?' Or can it be maintained that the best means of ascertaining what has been so declared is by taking the opinion of a majority of the 360 ministers and elders who form that venerable court? We should be glad to know, for example, what decision would probably be arrived at, on the relevancy of the minor proposition of a libel for Sabbath desecration—a good major charge undoubtedly; but it would be a delicate task to specify what facts will cover it—too delicate, one is inclined to say, for settlement by a vote of the 360. Many similar instances might be imagined; and it will be observed that no amount

of practice or precedent will avail to settle such questions, because, according to the 'Form of Process' above quoted, it is open to the Church judicature at all times to consider and to decide whether 'the act or universal custom of this National Church is agreeable' to the Word of God or not. So that what is this year held irrelevant to constitute an offence, may next year be sufficient to subject in the pains of church discipline and censure.

We have ventured almost to assume that, *primâ facie*, the numbers and constitution of the General Assembly prevent it from being the safest tribunal for determining what is, and what is not, relevant matter of libel. If it were necessary, it would not be difficult to mention many considerations which lead to this conclusion. The Assembly consists mainly of clergymen, but largely also of laymen. A body better qualified to regulate the internal arrangements of the Church it would be difficult to conceive. Their constitution renders them admirably fitted to legislate on all such matters. But when the question before them is, not what ought to be, but what actually is, the law of the Church, then we apprehend that they are necessarily exposed to the greatest possible danger of falling into error. How apt is such a body, with so much of the popular element within it, to be influenced by the persuasive art of the practised pleader, rather than by the soundness of arguments less eloquently handled by his opponent, or to give weight to the reputation of some distinguished professor of divinity, rather than to the humbler statement of the obscure minister who has been selected to support the decision of his Presbytery.

Many of the remarks which we have made on the mode in which questions of relevancy or law are dealt with, apply with equal force to the Assembly's procedure when engaged in the review of evidence, after the relevancy is disposed of. It is undoubtedly the theory of our Civil Courts, that the jury, that is, a certain small number of the public who have had no legal training, are peculiarly fitted to judge upon matters of fact. And we are far from denying that that is in many important respects true, although even from high legal authorities one hears increasing whispers of dissatisfaction with that tribunal. But a jury numbered by hundreds has no parallel in civil procedure; and any reforms in the Jury Court, which experience may have taught us to think desirable, are not likely to be in the direction of increasing the number of jurymen. Besides, the main end supposed to be gained by trying questions of fact before twelve or fifteen

laymen is, that they have an opportunity of judging of the credibility and accuracy of the witnesses who are adduced, from their demeanour in the witness-box. We do not know of any Court in which written or printed depositions are laid before a *jury*. A single judge, or a small bench of judges, is daily occupied in reviewing the records of evidence taken in the Inferior Courts, or by the Commissioners of the Supreme Court; but bodies of men unskilled in such work are never so employed. Still further, a jury in a civil or a criminal cause has the advantage of hearing an impartial and discriminating summary of the evidence from the presiding judge, who indicates his own opinion, backed by all the weight of his position and experience, and furnishes them with directions, which they are bound to follow, in all matters of law and competency.

But in our Supreme Ecclesiastical Court, what course is followed? A print of the evidence is put in the hands of each of the 360 members. At a certain hour, the counsel for the appellant rises to speak on behalf of his client, reads or refers to selected portions of the evidence, analyzes it as a whole, and compares part with part, stating the propositions and arguments which he founds upon it. The counsel for the respondent is then heard; he also reads such of the depositions as seem suitable, compares passage with passage, and witness with witness. Then follow the replies, and 'parties are removed.' But to whom have these speeches been addressed; or rather, who have heard them? The 360? By no means. And who are now to come to a solemn finding on the evidence? The members of the Court who were present and heard the speeches? Not necessarily, and not usually. It may be that the first part of the appellant's speech was delivered to half-empty benches, and amidst constant interruption. His opponent may, on the other hand, have risen to address a comparatively full house; but perhaps he has had a difficult case to make, and, in the performance of his duty, he must be somewhat elaborate in his survey of the evidence. It becomes tedious and irksome to listen to him, more particularly if, feeling that his work is too serious for levity, he does not indulge in those jocular displays for which the Assembly has long been thought the fitting theatre. One after another, tired members find their way into the lobby, and the second half of the speech is delivered to a restless and inattentive auditory. The motions follow, and the vote is taken, but not from those who alone are fit to judge, at least not from them only, but also from many

who have heard but a single speech, or part of a speech, or who have perused but scattered portions of the printed proof, and who necessarily therefore make up their minds, not after full and mature consideration and balancing of evidence, but from vague impression and partial information.

This is not an exaggerated statement of the facts; such things happen in the Assembly every year. The blame seems truly to lie not so much in the wilful indifference of members, as in the constitution of the Court, and in the kind of work which it attempts to perform. It would be next to impossible to contrive that a jury consisting of 360 persons, should listen to all the stages of a long debate, even supposing that it were desirable that so large a number should have an opportunity of doing so. But in the cases which perhaps most frequently come before the Assembly in its judicial capacity, what is more important, what is more essential to justice, than that the *whole* evidence and the *whole* argument should be before *all* of those who are to pronounce a decision upon it? Such a charge as one of drunkenness against a clergyman is easily made. There are not uncommonly many motives in existence, which may induce unprincipled and spiteful persons to make it recklessly and maliciously. Still more is this the case in charges of impure conduct. Frequently, when the charge is false, the difficulties in the way of disproving it are almost insurmountable; and, in every such case, the truth can be arrived at, only after a minute and searching analysis of evidence, demanding from those who are to decide upon it the closest attention and consideration. When one thinks of the terrible consequences which follow a wrong decision in such a matter,—either, on the one hand, overwhelming with disgrace and almost irremediable poverty an innocent man; or, on the other, inflicting on a parish for years the curse of a profligate pastor,—it is impossible not to feel, that any system which does not exclude, so far as human means can, the chance of error, ought at once to be abandoned.

It is generally much easier to point out a fault than to suggest a remedy for it; but we are inclined to think that the existing practice of other bodies, combining in themselves similar functions with those exercised by the General Assembly, and sufficiently dignified to warrant us in quoting their example even to that venerable House, will serve to indicate the most expedient mode of amending those faults of which we have been complaining. The House of Lords,

for example, is a legislative, but it is also a judicial body. It is the highest Civil Court in this country, but it has delegated all its judicial functions to a small number of its members—the ‘Law Lords;’ and they alone deal with the administration of the law, and act as judges. An important and well-known case is at this hour being heard by that tribunal. It will turn very much upon the construction that may be put upon a large body of printed evidence. What would the country think if the long arguments which have been day after day delivered at the bar of that House, were ultimately to be decided upon by the vote of a large and fluctuating body of Peers, of whom, in the course of the hearing, some were now present and attentive, when perhaps the evidence read was a little *piquant*, while others, when the argument was technical, and, except to a steady listener, unintelligible, were to be found in the library or the tea-room? But the cases sometimes heard at the bar of the Assembly, involving, as they often do, character, status, and the very means of existing, are, to the parties immediately interested, of little less importance than the issue of the case to which we have referred is to Mrs Yelverton. Again, the Privy Council has important functions to discharge of a judicial nature; but that august body, consisting of a large number of members, almost all of whom have been selected on account of their exalted intellectual attainments and mature wisdom, also delegates its judicial functions to the ‘Judicial Committee.’ We are not aware that in either of the cases which we have named, does the public feel dissatisfied because of the small number of the individuals who are selected to act as judges. Is there any reason why the Church of Scotland should not have a ‘Judicial Committee?’ or, at all events, Is there any reason why each General Assembly, on the first day of its session, should not appoint a committee to deal with ‘causes’ such as those which we have mentioned? The Assembly need not be necessarily and uniformly bound by the committee’s decision; but we think enough has been said, to show that the risk of injustice being done, of mistaken decisions being come to (and such things do happen), would be immensely reduced, if, in place of the present loose and anomalous system, a small body of men, selected on account of their conspicuous ability, integrity, and experience, were dispassionately and deliberately to hear and weigh the arguments and the evidence. Nay, the Assembly itself has already, in certain cases, adopted the very plan which we venture to

suggest. In petitions for restoration after deposition, we understand that the practice has been, at all events of late years, to 'remit to a committee;'—the Assembly generally, if not uniformly, homologating their judgment. To restore to office is scarcely, if at all, less important than to deprive of it. Why should the same practice not prevail in both cases?

A much wider field of inquiry, and one of still greater importance, would be raised by the consideration, Whether the Church and the country possess in the General Assembly, the best judicatory for determining charges not affecting conduct, but *doctrine*. The absence of a definite and precise declaration of doctrine, even if it were desirable, does not seem possible, in the case of an Established Church. It is a common fashion of the time, to speak slightly, sometimes abusively, of 'standards.' But whatever may be said as to the stringency and over-minuteness of definition, which characterize the standards of the Church of Scotland, it seems clear that the State Church cannot well be without a document or documents in which are to be read its distinctive tenets. But when these have been authoritatively settled and declared, what tribunal is to be appealed to, when they are alleged to be infringed or attacked? If a clergyman and his clerical censors wish to have the meaning of their standards of doctrine declared, to whom are they to go? Hitherto, in Scotland, the interpretation of the Church's doctrine has been left to churchmen. It may be true that a final appeal is in some circumstances competent, even in cases of heresy, from the decision of the Assembly to the Supreme Civil Court; but if the procedure in the former is in all respects regular and competent, the settlement of such cases remains with it. Now, it certainly seems to us very far from clear, that such a state of matters is likely to produce satisfactory results. The doctrine of the Church has been declared in its formularies or standards: the State gives its support to that particular Church because, or on condition that, it maintains that declared doctrine; but these formularies or standards are, like all other compositions, susceptible of different interpretations; and when the question arises, whether the established doctrine is or is not taught by a paid clergyman of the Church, to take the opinion of the majority of the existing ministers of the Church seems far from the best way of settling it. The interpretation of Church standards demands of their interpreter, along with other qualities, perfect

freedom from bias, calm logical precision, and both ability and will to discover and declare the strict grammatical sense of the words employed. We shall scarcely be accused of any want of due respect to the General Assembly, if we suggest a doubt, whether these qualities are likely to stand out with conspicuous lustre when a question of heretical doctrine comes before them for discussion. It must be borne in mind, that in such a case the issue is not, what is the truth? not, what *ought* the Church to teach? but, what has she *declared* to be the truth?—what have her ministers, by their ordination vows, bound themselves to teach? It certainly seems to us that questions such as these are more likely to receive a sound and impartial answer when they are submitted to the decision of men whose education has been specially directed to the careful balancing of expressions, and who can bring a calm, unprejudiced, judicial mind to bear upon them, than if left to be settled by the vote of a General Assembly of ministers and elders of the Church? The latter judicatory consists largely of men who have, in all probability, publicly committed themselves to a set of opinions on matters of doctrine, by which they feel constrained to abide. No amount of argument will avail to convince such, that other and wider views than theirs are within the limits of the Established Church. Tests, and formularies, and standards, ought to be construed on the same principles as Acts of Parliament; nay, in charges of heresy, to which penal consequences are attached, the same strict rules of interpretation ought to be applied to the Church's definitions of doctrine, as are applied to *penal* statutes. But Acts of Parliament are not construed by the Legislature that passed them; the administrators, not the makers of the law, are its interpreters. And, on the same principle, it is difficult to see why the decision should not be left to the ordinary judicial tribunals in cases such as those to which we are alluding, where the question to be tried is, or ought to be, nothing else than the fair grammatical sense of the terms which have been sanctioned by the Church and by the State, as expressive of the doctrine taught by the one, and endowed by the other. All chance of persecution or hardship is excluded, when a doctrinal offence is tried by a tribunal bound to decide by the strict letter of an unbending law. The persecutions of a few centuries ago were possible, just because the ecclesiastical councils who condemned heretics, confounded the legislative with the judicial function. They held themselves bound by no standards. If what

they considered a new error was taught by a son of the Church, they met it by new definitions of doctrine, not by applying to it the existing definitions, by which alone the alleged innovator ought to have been judged. Such a power, it is unnecessary to say, in an ecclesiastical court, is wholly adverse to our modern ideas of civil and religious liberty. When the General Assembly is called on to consider a charge of heresy, it is not entitled to lay down, *pro re nata*, new rules of faith. Its sole duty, in such a case, is to construe written documents—its own standards. Is it probable that it will perform that duty so well, so impartially, so satisfactorily, as the ordinary legal tribunals?

New Books.

Lectures on the Law of Scotland. By JOHN SCHANK MORE, LL.D., Advocate, Professor of the Law of Scotland in the University of Edinburgh. Edited by JOHN M'LAREN, Esq., Advocate. Edinburgh: Bell and Bradfute.

IN an envious age, when Lords Ordinary are termed obstructions, and Sheriffs useless ornaments, to the declining business of a selfish Capital, it becomes a pleasing task which leads us to fix our attention for a while on the labours of a position in the legal profession, the importance of which to the public has long been at once so modestly asserted and so deeply felt, as to place it still easily secure from the voice of detraction. The position we allude to is the unpretending but honourable as well as onerous post, held by a Professor of the Law of Scotland in the University of Edinburgh. The importance of that position to the law and to the public of this country has never been the theme of loud assertion, while it has silently commended itself to the judgment of observing and thoughtful men; its emoluments have never been such as to make it the prize in the profession most envied by the many; its duties have been uniformly so discharged, as to excite the emulation of the few who have aspired to their exercise. If the Court of Session be an institution of which Scotland at large only half appreciates the advantage, the Faculty of Law in Edinburgh is one to which our country will not decline to acknowledge her obligations. It is an institution, moreover, of which England envies us the possession, but of which her philosophers

have in vain striven to procure for her the counterpart. And at home it is not Edinburgh but Scotland, that feels a pride in the works which, first moulded as prelections for a class in our University, have become lasting possessions to the law of our country. The great systematic work upon Criminal Law by Baron Hume, consists in substance of the observations delivered as part of a course of academic lectures. To the same origin we are indebted for the elaboration of the comprehensive and accurate works of George Joseph Bell; and in the recent volume of *Lectures on Conveyancing* by the late Professor Menzies, we have the matured fruit of a course of labours in the sister chair, by which is placed before the student, in a clear and attractive form, an analysis of the singularly consecutive though often circuitous logic of our system of deeds. The works emanating from the source now contemplated form in fact a large and important portion of that series of philosophical and systematic treatises upon the Law of Scotland, which have contributed to give to the law itself its peculiar merits of consistency and harmony. It is by these qualities that our system of law is enabled to bear in many respects a favourable contrast with other systems, founded on the basis of a larger experience but forced into shape under the pressure of more hurried exigencies, and to embrace under a more comprehensive outline those general principles, which in the other systems seem lost in the endless variety of detail under which they are expressed.

The position of a professor of the Law of Scotland in the University of Edinburgh, is one peculiarly favourable to the production of works tending to the systematic development and arrangement of the principles of our law. To a mind versed in the practice of his profession, the commencing professor adds all the incentives of the duties of his new calling to induce him to systematize and arrange his accumulated stores of legal lore. The daily practical exercise of his profession gives point to his prelections; the daily exercise of his prelections gives system and order to the points forced on his attention by his daily practice. It is thus that, in a long course of such prelections, a work may be elaborated so as to mould into singular completeness the labours of former jurists, along with the changes made from time to time by new statute or decision. The latest contribution to the kind of literature referred to in the above remarks lies before us, in the shape of two volumes of *Lectures on the Law of Scotland* by the late Professor Schank

More, just edited by Mr John M'Laren; and we think these volumes calculated to prove not only to the student a useful introduction to the principles of the Law of Scotland, but also to be in themselves an element not without its importance in the series which forms the institutional literature of our profession.

The ground claimed in the editor's preface for the acceptance of these volumes, is the acknowledged want of a systematic treatise on the Law of Scotland, which, without departing from the general method and scope of the existing text-books, should at the same time offer the advantages of being written by a lawyer of the present age, and with special reference to the state of the existing law of our country. There are, however, some special features in the form of Professor More's lectures that make us inclined to welcome the publication, apart from the mere consideration of its being a systematic work which brings the law up to the present time. One of the difficulties which often meet the student in institutional treatises on law, arises from the dryness with which the principles are enunciated; for it often happens that through the want of some personal or living interest, the principle itself fails to fix itself in the mind. In the volumes before us this interest is often happily supplied. We are furnished not only with a statement of how the point is settled, but with a description of how it came to be settled. And the description is by one who has not merely drawn it from perusing the Reports, but has lived among those who assisted in setting the point at rest. We are told how the question was once understood in the Parliament House, on the authority of some old decisions; how it came to be tried; some slight expression indicates the interest felt in it at the time; then how it was argued and decided by the Court here; how it came to be appealed, and then for ever set at rest by the judgment of the House of Lords. All this is described without undue length, but with those undefinable touches of an eye-witness, so to speak, which so often give to a shorter narrative the power of creating an impression which circumstances detailed at second-hand may fail to convey. An occasional vein of satire, too, occasionally relieves the gravity of a legal treatise, though even in these passages the gravity is so well sustained that one might scarcely presume to suspect it. A good instance of this may be seen in the description of the stringency of our law of Deathbed. 'Even bonds of provision to younger children, however rational and moderate, are liable to be challenged by the heir on the head of deathbed, so far as they

are made to affect him. Lord Fountainhall mentions, "that when an overture was made in Parliament, in 1672, to allow heritors to burden their estates on deathbed with three or four years' rent for providing younger children, the motion was rejected, as tending to destroy the ancient families of the nation."'

We take it to be another great advantage of Professor More's Lectures as a text-book, that it has recurred to the order and system of the greatest of our institutional writers, Lord Stair. This is all the more fortunate, as we are not so certain of the Professor's original power of logical division and arrangement. At least, his perception in this respect we should be inclined to doubt, if we may judge from the beginnings of chapters VII. and VIII. of the First Part, where he speaks of 'the distinction which our law makes of rights into *heritable* and *moveable*, or *real* and *personal*;' and afterwards, of 'that great branch of our jurisprudence which relates to real rights, or to property in land.' Now, although *real* and *personal*, as *English* law terms, correspond very nearly to *our heritable* and *moveable*, it is an obvious mistake to speak of the distinction as identical; the more so, as the terms *real* and *personal* are properly used in Scotch law as translations of the mediæval terms *jura realia* and *personalia*,—as, for instance, when we speak of a servitude as a *real* burden. And this is the very use of the words the Professor has in his mind when he speaks of real rights as identical with *property* in *land*, though this is not *quite* correct in any sense of the words.

Besides the notes which supplement the text, especially in references to cases occurring in the last two years, one very important element in the edition before us is a complete table of cases and statutes cited, which are very numerous, and a full index, which together will considerably aid the value of the book as a work of practical usefulness to the profession.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

Susp. and Int., THE MAGISTRATES OF EDINBURGH v. THE NORTH BRITISH RAILWAY COMPANY.—May 25.

Interdict—Powers of Railway Company.

By the Act 23 and 24 Vict., c. 59, the North British Railway Company have power to purchase the land on which the fruit and vegetable markets are held, on paying compensation therefor in the usual manner under the Lands Clauses Act, but subject to the declaration that it shall not be lawful for the company 'to appropriate, use, and interfere with' the lands on which the markets are held, or any of the accesses thereto, until a new or substituted market shall have been constructed, and made over ready for use to the Lord Provost and Magistrates. By another section of the same Act, the railway company have power to shut up a part of Canal Street, on opening a new communication for foot passengers between the public footpath and stairs at the north-east side of the North Bridge and the Physic Gardens. With a view to erecting this new communication, which was to be a footpath bridge, the railway company recently began to found two small piers in the markets as supports therefor. The Magistrates thereupon presented this application, praying that the respondents should be interdicted from proceeding with the operations which had been begun, until a new market had been constructed and made over ready for use. The Lord Ordinary on the Bills, before whom the case came in vacation, passed the note on caution, and granted interim interdict against the proceedings complained of. The railway company having reclaimed against this interlocutor, the Court to-day refused the reclaiming note. The result is, that the operations of the railway company in the markets are suspended whilst the rights of parties are being tried under the passed note.

App., BEESON, IN COPELAND'S SEQUESTRATION.—May 26.

Sequestration—Appeal—Competency.

In this sequestration the claim of one of the creditors (Beeson) was disputed, and the trustee's deliverance appealed against. During the pendency of this appeal the bankrupt made an offer of a composition, which was accepted by the creditors, and a deliverance was pronounced by the Sheriff declaring the sequestration at an end. In the composition contract there was an express reservation of all claims then under appeal. Notwithstanding this reservation, Beeson offered to prove, that although it appeared on the face of the offer of composition that his claim was reserved, yet in reality it was not so, and the intention and understanding of all the parties was that it should not be so. The cautioner for the bankrupt having opposed this contention, the Sheriff-substitute at Forfar (Robertson), of a date subsequent to the deliverance declaring the

sequestration at an end, allowed a proof *prout de jure* as to Beeson's contention, and, after the proof had been led, pronounced an interlocutor construing the reservation in the offer of composition, and finding in terms of the construction. This interlocutor was partly in favour of and partly against both Beeson and the cautioner for the bankrupt, who was the only other party interested; and notes of appeal were accordingly presented against it by both parties, in so far as it was adverse to each. In the course of the discussion before the Court to-day, it was admitted on both sides of the bar that the litigation in which the interlocutor under review was pronounced was irregular; and the Court, proceeding on these admissions, quashed the whole procedure subsequent to the date of the recall of the sequestration.

Lord Curriehill was of opinion that the whole procedure was incompetent, holding that when the interlocutor was pronounced, declaring the sequestration at an end, all appeals in that sequestration fell along with the original process; that the process being at an end, everything arising out of it was at an end also.

The Lord President and Lord Ardmillan thought it was not necessary for the disposal of the present case to decide that question, there being sufficient material for decision in the admissions at the bar as to the irregularity of the proceedings. Their Lordships stated, however, that if they had been to decide the question at present, they would have concurred with Lord Curriehill in holding that all appeals fell along with the sequestration.

Lord Deas concurred in the judgment to be pronounced, but solely on the ground of the admitted irregularities. He gave no opinion as to whether it was incompetent, after a sequestration was at an end, to proceed with an appeal then in dependence.

R. N., MARSHALL v. GRANT AND SILLARS.—May 31.

Reduction—Assignee—Title to Sue.

These cases were conjoined processes of suspension and reduction, the proceedings in which were very voluminous.

The Court, without calling on the counsel for Grant and Sillars, adhered to the Lord Ordinary's judgment. Their Lordships held that an assignee was entitled to sue in name of his cedent, and that a transferee from an assignee had the same privilege. Sequestration did not operate a complete dissolution of a company, and the company subsisted for such a purpose as the firm of Grant and Co. had been applied to. The trustee on Grant and Co.'s estates could have sued in their name, and he could assign his right with the same privileges. This was the case even if his assignee had been a third party, and the case was *a fortiori* when he was one of the original creditors in the debt.

Grant and Sillars were found entitled to expenses.

GRAHAM BARNES v. ALLAN AND CO.—June 1.

Landlord's Hypothec—New Trial.

The question raised in this case is whether the landlord's right of hypothec for rent extends to meal manufactured from oats grown on the farm, the meal being manufactured and sold by the tenant. The pur-

suer is proprietor of the farm of Hobsland, in the parish of Monkton and county of Ayr, of which William M'Culloch and Adam M'Kergow became joint tenants for twelve years from Martinmas 1858. By an agreement dated in September 1862, the tenants renounced their lease from Martinmas 1862 as to the arable lands, and from Whitsunday 1863 as to the houses and grass. The tenants paid no part of the rent of the farm for crop 1862, and on 15th December of that year the landlord sequestrated the whole crop and stock. Between the end of November and 15th December 1862, M'Culloch sold to the defenders, who are grain and meal dealers in Ayr, about 45 loads of oatmeal, made from the crop of Hobsland of 1862. The sale was effected in bulk in the defenders' stores in Ayr, to which M'Culloch drove the meal in carts, offered it for sale, and received payment of the price. As the crop and stock covered by the landlord's sequestration was not sufficient to meet the whole rent for crop 1862, he brought the present action against Allan and Co., the purchasers of the meal, to recover L.76, 10s., as the price thereof. The issue sent to the jury put the question whether the defenders had bought the meal in question in violation of the landlord's right of hypothec, and were indebted and resting owing to the pursuer the price thereof. The jury returned a verdict for the defenders by a majority of 9 to 3, and the pursuer moved to have the verdict set aside as contrary to evidence, and a new trial granted.

To-day the Court unanimously set aside the verdict, and granted a new trial.

Lord Curriehill said that, in view of the admissions made at the trial, the question was reduced very much to a question of law, whether or not the landlord's hypothec attached to the meal. There was no doubt that it attached to the grain from which the meal was made; but the question was whether the defenders, having purchased the *meal*, were affected by the hypothec. The jury returned a verdict for the defenders; and this was an application for a new trial, on the ground of the verdict being against evidence. The answer to the application depended on the question stated above, and on the knowledge of the defenders of the circumstances of the case. As to the question whether the hypothec attached to the meal, there was not much difficulty. It did so attach to the meal; and if the question had been between landlord and tenant, there would have been no doubt that the hypothec would not have been lost by conversion of the grain into meal. The landlord might have obtained restoration of the meal any time before the sale of the meal; and even after the sale, if the price had not been paid, he would have had a good claim for the price as payable to him and not to the tenant. But was the hypothec pleadable against a purchaser who had paid the price? Now, it was settled that the hypothec was effectual against the purchaser in the ordinary case; but that principle was subject to qualification. On the one hand, a purchaser direct from a tenant was bound to inquire if the rent had been paid, and if he omitted that precaution he must take his risk; but in the case of a purchaser in public market there was more difficulty. His Lordship, however, did not think that it had been made out that this was a purchase in public market. He doubted whether there was a public market for such commodities. The meal was brought to the purchaser.

Still the new question arose, whether or not the conversion of the oats into meal did not put the purchaser in *bona fide* possession as much as if the purchase had been made in public market. On looking to the evidence, he thought that the purchaser was fully aware of the history of this meal. Before the purchase the raw material had been offered him; and though he refused to make the purchase at the time, yet, on the tenant offering to convert the grain into meal, he said he would be ready to make the purchase. There was no purchase made at that time; but the conversion was made, and then their arrangement was carried out; and the fair inference was, that the purchase was made under the knowledge of the conversion of the grain; and as the hypothec attached to the grain, he thought it attached also to the meal. In the circumstances of the case, therefore, he thought that the hypothec must be held to be effectual against the purchaser.

Lord Deas said that any one who read the newspapers must be aware that there had been considerable discussion lately on the subject of landlords' hypothec. Had he been a legislator, he would have thought that there was a great deal to be said on both sides of the question; but being a judge, he could only deal with not what the law ought to be, but what the law was. In the present case there was no room for dispute, or even for doubt, as to the facts. His Lordship then gave a short statement of the facts, and said that the question came to be, What, as the facts now appear, is the law applicable to these facts? Two questions of law arose—1st, Apart from the question of public market, whether the grain having been converted into meal, and the meal removed and sold in bulk to a *bona fide* purchaser who paid the price, that prevented the hypothec from applying? There was no doubt that the grain crop of 1862 was subject to hypothec for the rent of 1862, and that if it had been removed in bulk, and sold and paid for, the hypothec would still have attached to it, and it might have been vindicated in the way in which it is here proposed to vindicate the meal. Therefore the question was, whether the conversion into meal prevented the hypothec from attaching. He could find neither principle nor authority for holding that this made any difference. The meal was the produce of the farm, altered by a mechanical process somewhat more than if it had been merely thrashed, but the change was of the same nature; and if cutting down and thrashing the grain did not remove the hypothec, it was difficult to see how the subsequent mechanical change made any difference. It did not follow from this, that a change might not be made which might affect the hypothec. It was not necessary to inquire into the possible effect of these changes. If grain were to be converted into cakes, or porridge, or into whisky, that was a matter which it was not necessary to consider here; then the question would arise, Was it the same article? Changes of that nature on a subject might make it impossible for a purchaser to know what it had been originally; but the change made on the grain here did not even effect the name of the material. It might be called grain as much after grinding as before. Coffee did not lose the name of coffee after being ground. As to the second question, he agreed with Lord Curriehill that the place of purchase here was not a public market. A public market was one where the grain would be exposed in bulk to all comers, and then there would be ample publicity for security of the landlord. He knew no authority

that a store, as in the present case, could be called a public market. To hold that it was so, would be not to administer, but to make the law. He was therefore of opinion that the verdict must be set aside.

Lord Ardmillan and the Lord President, who expressed his opinion last, being the judge who presided at the jury trial, concurred on similar grounds.

The pursuer moved that the verdict should only be set aside under the condition that the expenses of the first trial were paid by the defenders. The Court, however, set aside the verdict *simpliciter*, reserving all questions of expenses to await the final issue of the cause.

Pet., BATHGATE (TRUSTEE FOR BEHOOF OF WALKER'S CREDITORS), FOR APPROVAL OF SCHEME OF RANKING AND DIVISION OF PRICE OF HERITABLE ESTATE.—June 2.

Sequestration—Ranking.

The question in this case has reference to the claims and order of ranking upon the price of certain heritable subjects which belonged to the sequestrated estate of Mr Walker, and which had been sold by the trustee in the course of realizing the property under the Bankrupt Statute. The subjects were sold for the sum of L.2250. This sum is insufficient to pay the claims of the heritable creditors. These are A., who is a creditor for L.1600, B. for L.650—these two principal sums being the amount of a bond over the property; and C., who claims to be ranked *pari passu* with A., and preferable to B., for a sum of L.100 odds. This latter sum is interest on the above bond for L.2250, which had accrued prior to A. and B. acquiring right thereto. The bond out of which the various claims arise was granted by the bankrupt and the claimant C., as a joint and several obligant, in favour of Messrs J. and J. Blaikie. This bond was subsequently assigned by the Messrs Blaikie to A. to the extent of L.1600 *primo loco*, and to B. to the extent of L.650 *secundo loco*, with the future interest to become due thereon; and A. and B. agreed to take the security without the continuance of C.'s personal obligation for the sums assigned to them respectively, being the whole amount of the principal sum contained in the bond, and all future interest thereon. At the same period an arrear of interest on the bond, amounting to upwards of L.100, then due on the sum secured by the bond, was assigned by the Messrs Blaikie to D., who advanced the amount, being part of a loan by D. to C. In security of that advance, D. got, *inter alia*, an assignation to the above-mentioned past due interest on the bond. C. afterwards made payment to D. of the sums which he had advanced to him, and took an assignation in his own favour of the security for said past due interest. It was substantially admitted that A. was entitled *preferably* to the L.1600 for which he was heritable creditor; but C. claimed to rank preferably to B. for payment of the said sum of interest, and pleaded that as the interest was as effectually secured as the principal over the subjects of which the price is here the *fund in medio*, and as he was now in right of the said sum and security by virtue of the above narrated transfer from D., he was entitled to payment out of the fund. He further pleaded that, as the said security subsisted undischarged at the date of the delivery of the assignation in favour of A. and B., it was not transferred to them or in

any way affected by the assignation in their favour of the principal sum and subsequent interest. On the other hand, B. claims the whole free balance of the price of the subjects contained in the bond after paying A. the sum due to him; and pleads that as C. is himself personally liable (as in a question with B.) for the sum in respect of which he claims to be ranked, he is not entitled to be ranked in competition with him or to his prejudice.

The Lord Ordinary sustained B.'s pleas, and found that he was entitled to be ranked preferably to C. C. reclaimed; but to-day the Court adhered, on the ground that C. is not in a position to make the security available to him for the arrear of interest in competition with either of the onerous assignees of the principal sum. At the date of the assignation in their favour they were entitled to treat the arrears of interest as due only in terms of the bond—that is, by C. as a joint and several obligant. If he paid the arrears of interest, the debt was brought to an end as in a question with them, and he was not entitled to take an assignation to compete with their security.

Reclaiming note refused with expenses.

Susp. and Int., THE EARL OF MORAY v. RODDICK.—June 3.

Suspension—Designation of Grass Glebe.

The respondent in this suspension and interdict, who is the Rev. George Roddick, minister of Aberdour, applied to the Presbytery of Dunfermline, within whose bounds his parish is situated, to designate a grass glebe to him, in terms of the statute 1663, c. 21. The Presbytery, on considering the petition, and taking the other formal procedure, designated to him six acres Scots of a park called the Bell House Park. The Earl of Moray, to whom the Bell House Park belongs, has presented the present application, praying that the award of the Presbytery may be suspended, and Mr Roddick be interdicted from taking possession of the ground designated. The grounds of suspension are, that the lands in question are not liable to designation under the Act 1663, c. 21, because they are not kirk lands, but are arable lands, and because the designation 'was highly injurious and oppressive to the complainer.' The respondent denies these propositions, and, in regard to the character of the lands designated, avers that they originally belonged to the monastery of St Colme, and that when the monastery was inhabited by the monks of St Colme, the park of Saudylees was called, and has since been called, the Bell House Park, there being upon it a house for a bellman to warn the monks when a boat was required to take visitors off to the monastery of St Colme.

A proof having been led, the Lord Ordinary (Ormidale) found (1) that the lands designed were church lands, and therefore repelled the suspender's plea founded on that assumption; (2) that the suspender had failed to prove that the lands were arable in the statutory sense, so as to render it incompetent to design them to the minister for grass; and (3), before disposing of the other pleas, or determining whether the designation in question should be sustained, appointed parties to be further heard on the question whether there were other lands in the parish which ought, rather than those in question, to be designed to the respondent for grass.

The Earl of Moray reclaimed; and to-day the Court adhered to the first finding of the Lord Ordinary's interlocutor, recalled the second finding *in hoc statu*, and remitted to his Lordship to hear parties on the remaining pleas.

LOCALITY OF CAPUTH.—June 3.

Teinds—Liability—Decimæ inclusæ.

In this case a question is raised between the common agent in the locality of Caputh and the trustees of the late John Duke of Athole as to whether certain lands belonging to the latter were not liable for payment of teinds. To-day, the Court, recalling the interlocutor of the Lord Ordinary, held that as all lands are presumably liable in payment of parsonage teinds, the *onus* is on the owner disputing this liability to instruct his claim to exemption, and that in the present case the trustees of the Duke of Athole had not discharged this *onus*, inasmuch as they had failed to prove (1) that the lands in question before the Reformation belonged to a monastic institution; (2) that under the titles to the lands they had been possessed *cum decimis inclusis*; and (3) that the titles contained the additional words, *et nunquam antea separatis*. All these points must have been proved to make out that the lands were not liable for teind duty, and in the present case none of them had been established.

M'VEAN v. M'VEAN.—June 4.

Joint Tenancy—Proof.

The pursuer and defender, who are father and son, are joint-tenants of the farm of Sallachan, on the estate of Ardgour, in Argyllshire, under a minute of lease dated in 1853. The son has since that date resided at and managed the farm of Sallachan, and the father has lived at another farm of which he is tenant. The latter now brings the present action against the former, to have it declared that he is entitled to the joint use and occupation, along with the defender, of the dwelling-house and other houses at Sallachan, and to a joint management of and interest in the farm. The defender pleads, that although under the minute of lease his father appears to be joint-tenant with him, it was not intended that he should have any interest in the lease, which was to be for his (the son's) exclusive benefit. A question having been raised as to the kind of proof admissible to support the defender's statements, the Lord Ordinary (Barcaple) held that the defender was not excluded from proving his averments otherwise than by writing.

The pursuer having reclaimed, the Court to-day recalled the Lord Ordinary's interlocutor,—holding that, as *ex facie* of the lease, the father and son were joint-tenants of the farm, the son's averment that the father occupied that position solely for his (the son's) benefit, was an averment of trust, which could only be proved by writ or oath.

THE TOWN-CLERK OF PORTOBELLO v. THE PORTOBELLO TOWN-HALL COMPANY (LIMITED).—June 7.

Suspension—Lease—Reduction.

The case of Alexander Paterson, town-clerk of Portobello, as representing Commissioners of said town, complainers, against the Portobello

Town-hall Company (Limited), respondents, came up for consideration before their Lordships in the First Division to-day.

The case came up on a reclaiming note, at the instance of the complainers, craving their Lordships to review an interlocutor which the Lord Ordinary on the Bills (Curriehill) had pronounced in April last on a note of suspension. The interlocutor complained against was as follows:—

'Edinburgh, 26th April 1864.—The Lord Ordinary having heard parties' procurators, and thereafter considered the note of suspension and answers thereto and productions, refuses the note: Finds the suspender liable in expenses, and remits the account thereof, when lodged, to the auditor to tax and to report; but prohibits the clerk from issuing any certificate of refusal for fourteen days from this date, and if a reclaiming note is lodged within that period till the same is disposed of.

(Signed) *'JOHN MARSHALL.*

'NOTE.—As the suspenders have enjoyed possession of the subjects of the lease for the whole of the first half-year, and for nearly the whole of the second half-year, the Lord Ordinary does not think they should withhold the payment of the rent for these two half-years during the dependence of the litigation; and as the merits of the question are to be tried in the process of reduction which has been instituted, there is no occasion to pass the note of suspension for that purpose.

(Signed) *'J. M.'*

Lord Curriehill made a few remarks in support of his interlocutor, stating that he had no doubt about the point that the Commissioners had possession of the subjects for nearly twelve months. Though it had been stated that the money had been lodged in bank, he considered that the landlords ought to have had the money.

The Lord President stated that the question was not so much that of the reduction of the lease, as that of whether the question of the note of suspension was to be passed or not. This only referred to the two half-years' rents, and for his part he felt no hesitation in confirming the interlocutor of Lord Curriehill.

Lord Deas held that, if the note of suspension were passed, there would be two actions going on at the same time, while the money would remain in the bank instead of being in the hands of the landlords. He concurred in the remarks of the Lord President.

Lord Ardmillan also concurred.

The reclaiming note was accordingly refused.

STEWART AND OTHERS v. THE GREENOCK HARBOUR TRUSTEES.—*June 7.*

Railway Company—Right to Lay Rails on Public Streets.

Some time ago the defenders laid down a line of rails leading from the goods dépôt of the Greenock section of the Caledonian Railway at Greenock to the harbour. This line of rails extends along the centre of Virginia Street for the whole length of that street, and crosses Chapel Street and Rue End Street, where these streets intersect Virginia Street. Waggons and trucks of goods are constantly being taken along this line, driven sometimes by horse power, but chiefly by locomotive engines and steam power. The pursuers, who are proprietors of certain subjects in Virginia Street, have brought the present action to have it declared that the defenders have no right or title to make or use this line of rails along

the public streets of the town, and that they should be ordained to remove them. The Lord Ordinary (Kinloch) found that the defenders had no right to lay the rails in question, and that their doing so was an illegal act. Against this interlocutor the defenders reclaimed, and at the discussion to-day demanded a proof of their averments that the rails in question were laid with the sanction of the magistrates of Greenock as the managers and trustees of the streets, and that the use of the railway did not cause any inconvenience or danger.

The Court unanimously adhered to the Lord Ordinary's interlocutor.

JENKINS AND OTHERS *v.* GRIGOR AND OTHERS.—*June 9.*

Right of Way—Res Judicata—Litescontestation.

In 1860, the Provost, Magistrates, and Council of Elgin, as representing the community of the burgh of Elgin, and for behoof of the public and two private individuals residing in Elgin, brought an action against Mr Grigor, proprietor of the Haugh, and Mr Robertson, proprietor of the North College, both near Elgin, to have it found and declared that there exists a public right of way for foot passengers along the bank of the River Lossie, through the defenders' property. The case having been tried before a jury, a verdict was returned for the pursuers. The Court, on the application of the defenders, set aside the verdict as contrary to evidence, and granted a new trial; the judges in doing so remarking that, on the same evidence, it was impossible for the pursuers ever to succeed, and that if a similar verdict were again returned by a jury on the same evidence, it also would have to be set aside. The pursuers did not proceed to a new trial, but arranged a minute with the defenders, agreeing to pay the latter a certain sum for expenses, and to decree of absolvitor in their favour being pronounced, which was accordingly done by the Court in terms of this minute. In 1863 the present action was raised at the instance of certain persons residing in or near Elgin against the same defenders, and with the same conclusions as the former action; in short, again to try the question of right of way along the same road. The defenders pleaded, *inter alia*, that the decree of absolvitor in the former action was *res judicata*, and therefore a bar to the present case being proceeded with. The Lord Ordinary (Jerviswoode) sustained this plea, and assoilzied the defenders, whereupon the pursuers reclaimed to the Inner House. The case, which was debated some time ago, was advised to-day, when the Court, by a majority, adhered to the Lord Ordinary's interlocutor, and assoilzied the defenders.

Lord Curriehill dissented. He could not see that there was any such connection between the pursuers of the first action and the public as to empower them to surrender any rights belonging to the public. He could see no authority or principle for any such doctrine. If the defence of the hardship of successive litigations was to be sustained, it would be on the principle of expediency, and not *res judicata*. The defenders here misrepresented what had taken place in calling it *res judicata*. It was not *res judicata*, but a transaction in its proper meaning. There could only have been *res judicata* if the case had gone to a second trial; but there was no such trial, for by agreement the pursuer withdrew the case from judicial determination. The decree following upon the minute for the parties was merely an interposition of authority to that minute.

That was a transaction—that is to say, a voluntary settlement—not binding on third parties, and the right of the public to the use of the roads was not thereby affected. The effect of the interlocutor appointing a new trial only made it incumbent on the pursuers to adduce additional evidence to prove their issue. The Court did not state that there was not evidence to prove larger possession, or to rebut the alleged interruption. Nor was there anything in the written agreement between the parties to warrant that conclusion. Had the pursuers merely abandoned the action, a judgment by default would have been of no effect against the public, as it would still have been *res inter alios acta*. He was of opinion the plea of *res judicata* should be repelled.

Lord Deas was of the same opinion as the Lord President.

Lord Ardmillan also concurred with the Lord President.

Pet., G. D. ROBERTSON (STROWAN ENTAIL).—June 10.

Entail—Petition for Disentail.

The late George Duncan Robertson of Strowan, on 4th February 1863, presented this petition to the Court for approval of, and warrant to record, an instrument of disentail, duly executed by him in terms of the Acts 11 and 12 Vict., c. 36, and 16 and 17 Vict., c. 94, of certain portions of the entailed estates of Strowan. The necessary consents were procured under an obligation to pay to the granters thereof certain sums of consideration money; and the last of the deeds of consent was lodged in process of 30th March 1864. On 3d April 1864, Mr Robertson, the petitioner, died, leaving a general disposition and settlement, and two relative codicils, disposing to Mrs Robertson in liferent, and to Mr Luxford, junior, in fee, his whole fee-simple estate. After the disentail was agreed to, and on the faith thereof, Mr Robertson spent a large sum (£10,000) on a mansion-house on the lands which he proposed to disentail. Mrs Robertson and Mr Luxford, senior, as administrator-in-law for his son, lodged a minute narrating these circumstances, and craving the Lord Ordinary to sist them in the petition in the room of Mr Robertson, and thereafter to approve the instrument of disentail, and authorize the same to be recorded in the Register of Tailzies. The Lord Ordinary found that the petition could not competently be prosecuted by the representatives and disponees of the petitioner, and refused the motion. Mrs Robertson and Mr Luxford reclaimed. The Court to-day unanimously adhered, without calling on counsel for the respondents, the heirs of entail.

LORD MACDONALD v. HIS NEXT OF KIN.—June 11.

Curator—Domicile—Jurisdiction.

The late Lord Macdonald nominated in his will his wife, Lady Macdonald, to be guardian, tutor, and curator to such of his children as should be in pupillarity or minority at the date of his death. Lord Macdonald died in 1853, leaving his eldest son in minority; and owing to Lady Macdonald's precarious state of health, she declined the office of curator. In these circumstances the minor brought the present action of choosing curators against his next of kin, and lodged in process a deed nominating to that office his maternal uncle, the Earl of Listowel. As that nobleman is at present residing in London, and has an English domicile, and is not subject to the jurisdiction of the Scotch Courts, some doubt was enter-

tained as to the expediency of the Court's granting a judicial approval of the nomination.

The Court to-day stated, that though there was no precedent for approving of the appointment of a curator not subject to the jurisdiction of the Court, as the circumstances of the present case appeared to them to warrant it, they would approve of Lord Listowel's appointment, he, in his bond of caution, being taken bound during the continuance of his office to appear before the Lords of Council and Session to answer for his conduct as curator; he submitting himself to and prorogating the jurisdiction of the Court for that purpose, and fixing a domicile in Scotland at which he might be cited; and he being also bound to obey and fulfil all orders of the Court of Session in reference to the curatory.

PETITION TO DISENTAIL—MR CARRICK BUCHANAN.—*June 11.*

Entail—Excambion—Compensation Money—Lands Clauses Act.

This is a petition at the instance of Mr Carrick Buchanan to disentail the Estates of Drumpeller and Burnhead, under the third section of the Rutherford Act. The third section of the Rutherford Act applies to entails executed before 1848; but a number of the entails under which the lands of Drumpeller and Burnhead are held are dated after 1848. These lands were acquired (1) under contracts of excambion; (2) with compensation money paid for portions of the entailed estate taken by a railway company under authority of the Lands Clauses Act, the application of the money having been authorized by the Court; and (3) under arrangement with those heirs of entail whose consent to disentail are required by the Rutherford Act. The Lord Ordinary (Barcaple) reported the case, indicating an opinion that the lands acquired by contracts of excambion, and with compensation money, might be held as coming within the provisions of the third section; but that those acquired by private arrangement could not be so regarded. To-day the case was advised.

The Lord President said that he agreed with the view stated by the Lord Ordinary as to the lands received in excambion and by private agreement. As to those bought with compensation money there was more nicety, as the language of the Lands Clauses Act was not very explicit; but on the whole he was of opinion that the lands so acquired were to be regarded as a surrogation provided by law for the land taken from the estate, that they were to be regarded as part and portion of the entailed estate, and consequently as held under the original entail, and so brought within the operation of the third section of the Rutherford Act.

The other judges concurred.

THE INSPECTOR OF POOR OF THE PARISH OF NORTH LEITH *v.* THE COMMISSIONERS FOR THE HARBOUR AND DOCKS OF LEITH.—*June 17.*

Poor Law Amendment Act—Assessment—Liability of Harbours and Docks.

The question raised in this case is, Whether the harbour and docks of Leith, with the revenue derivable therefrom, are lands and heritages in the sense of the Poor-law Amendment Act, 8 and 9 Vict., c. 83, and as such liable to assessment for the support of the poor?

The defenders contended that the right of port and harbour, and of levy-

ing dues on goods and shipping, did not fall within the description of lands and heritages in the sense of being assessable under the Act; and that the subjects held by them being held solely and exclusively for the benefit of the public, and further, the rates and revenues leviable by the defenders being by law limited, and appropriated to the maintenance and repair of the harbour and the liquidation of the debt incurred in the construction of the works, they were not liable to assessment for poor-rates.

The Lord Ordinary (Jerviswoode) decerned in terms of the declaratory conclusions of the summons, finding that the harbour and docks of Leith, with the revenues thereof, were liable to assessment for poor-rates, but reserving for further argument all questions as to the amount and manner of the assessment.

The defenders having reclaimed, the Court to-day (Lord Curriehill dissenting) affirmed the Lord Ordinary's judgment. Their Lordships were of opinion that there was no difference in principle between this case and that of *Adamson v. The Clyde Navigation Trustees*, 27th January 1860, which must form the rule of judgment in deciding the present case.

SECOND DIVISION.

VEITCH AND MANDATORY *v.* MURRAY AND Co.—May 25.

Guarantee—Liability.

This was an action at the instance of George Veitch, ironmonger in London and Birmingham, and J. P. Falkner, his mandatory, against W. S. Murray & Co., merchants, Glasgow, and Murray & Co., manufacturers of tobacco pipes, Glasgow, concluding for payment of L.31, 9s. 6d., being the amount of an account for goods sold and delivered by the principal pursuer to the defenders, W. S. Murray & Co., on 14th June 1861, and payment of which the pursuer alleged was guaranteed by the defenders, Murray & Co.

The Lord Ordinary (Lord Barcable) held that the letter of 18th July 1860 imported a continuing guarantee intended to subsist until it should be recalled, and found the defenders, Murray & Co., liable as cautioners for the sum sued for. The defenders reclaimed. To-day, without calling on the respondents, the Court unanimously affirmed the judgment of the Lord Ordinary, and dismissed the reclaiming note.

HALDANE *v.* MINTO.—May 31.

Suspension and Liberation—Bill of Exchange.

Andrew Haldane presented a note of suspension and liberation against Andrew Minto, jun., of a charge upon a bill drawn by Minto upon, and accepted by, the suspender. The suspender stated that on 28th April last he was incarcerated at the instance of the respondent in virtue of an extract registered protest on a bill for L.100. He alleged that on 12th January he had paid L.43, 10s. to account of his debt, and on 11th March a further sum of L.10, 12s.; that on 10th or 12th of March he sold and delivered to Minto two cattle at the price of L.10 each, which price was to be imputed to account of said debt. He further alleged that on 25th April, Minto obtained a decree in a process of multiplepounding at the instance of Thomas Yellowlees against the suspender and others, ranking and preferring the respondent, as in right of the suspender, to

one-half of the sum of L.29, 12s. 1d., and that some days before the warrant of imprisonment was applied for, he gave the respondent a quantity of turnips to account of the said debt. The suspender went on to state that notwithstanding the above several payments, he was incarcerated and booked in the prison books of Jedburgh for L.56, 10s., thus giving credit only for the first payment of L.43, 10s.; that on 29th April the further sum of L.10, 12s. was deducted; and that then his agent tendered payment of the balance due after giving credit for the price of the cattle, and the sum in the decree of preference in the multiplepoinding, which tender of payment was refused. He denied liability for more than L.11, 2s., which sum he offered to consign. The respondent admitted the partial payment of L.43, 10s. and L.10, 12s., but denied that he was bound to impute the value of the cattle and turnips to account for the debt in the bill, the suspender being due him other debts, to account of which these sums were imputed. He further stated that he had not yet received any payment under the decree, and that no fund might remain out of which he could obtain payment, and he averred that the first two payments to account had been duly credited in the diligence. The Lord Ordinary (Lord Kinloch) refused the note of suspension, stating, in his note to his interlocutor, that had the complainer offered caution in common form, he might have been entitled to inquiry into the matters averred by him, but that here he had not shown such a case as to warrant interference with the creditor's diligence without full security.

The suspender reclaimed, but to-day the Court adhered, holding that if there was any mistake in the entry in the prison books it was not a mistake for which the incarcerating creditor was liable; that the delivery of the cattle and turnips could not be held to be payments at all, but if they had been in the position of indefinite payments, the creditor was, in the circumstances, entitled to impute them to his least secured debt.

Adv., THE SHAW'S WATER COMPANY v. CAMPBELL.—June 2.

Feu-Contract—Judicial Reference—Jurisdiction.

This was an advocacy from the Sheriff of Renfrewshire. The respondent, Mr Campbell, who is a merchant in Greenock, feued from the Shaws Water Company a site for a mill on their eastern line of leads, together with a right to a fall of water, nineteen and a-half feet high, for driving his mill. The feu-contract refers to and incorporates itself with certain regulations framed by the Water Company. By article 14 of these regulations it is provided that 'in all cases of dispute or difference of opinion, whether occurring between the Company and the proprietors or occupiers of mills, or any of them, or between the different proprietors or occupiers of mills themselves, respecting the true and proper meaning of these regulations, or any part of them, the same shall be referred to the decision of arbiters mutually chosen by the respective parties; and the arbiters shall previously choose an oversman to decide in case of difference of opinion, whose award shall be final.' 'And no owner or occupier of a mill shall be entitled to convene the Company, or the proprietors or occupiers of any other mill, in an action of damages before a court of law, unless he shall have previously named an arbiter on his part, and shall have notified this in writing to the Company or other opposite party, and required them to name one on their part, and shall have offered to

subscribe a submission empowering the arbiters to determine the Company's or other opposite party's liability for damages, and to fix the amount thereof; and in every case of arbitration, in the event of the delay or refusal of either party to name an arbiter after a requisition of six days by the opposite party in writing, whether in a question between the Company and the owners or occupiers of mills, or between the owners and occupiers of mills themselves, the arbiter for the party so delaying or refusing shall be named by the Sheriff-Depute of the county for the time. on the summary application of the other party, to act along with the arbiter named by that party, and such arbiter shall have the same powers as if regularly named by both the parties, so that, in no case regarding these regulations, it may be competent for any of the parties above mentioned to sue the other party in a court of law.' Mr Campbell having several grounds of complaint against the Company, after an unsuccessful correspondence named an arbiter on his own part, and called on the Company to name an arbiter on their part. The Company having failed or delayed to name such an arbiter, Mr Campbell presented a petition to the Sheriff, asking him to name one, in terms of the 14th regulation. The grounds of complaint are thus set out:—The petitioner, as proprietor of the said mill, and possessing the fall connected therewith, has claims of damages against the respondents in respect—1. That the fall for which the petitioner pays rent to the respondents is not of the height stipulated for in the contract between the petitioner and respondents; 2. That the respondents authorized or permitted the occupant of the fall immediately below that of the petitioner to place an obstruction on the lead, which dammed back the water upon the petitioner's wheel, and occasioned damage to the petitioner to the amount of several hundred pounds; 3. That the petitioner, since the month of November 1858, has not had, as by the contract between him and the respondents he was entitled to have, the exclusive use and occupation of the ground and fall included in the contract between him and the respondents. The Sheriff-Substitute, before whom the petition was laid in the first instance, named Mr John Thomson, C.E., Greenock. The Shaws Company reclaimed to the Sheriff. maintaining *inter alia* that under the 14th regulation such application could only be presented to the Sheriff, and not to the Sheriff-Substitute. The Sheriff (Fraser) refused the reclaiming note, and adhered to the Sheriff-Substitute's nomination. The Shaws Water Company then presented a note of advocacy, when they, for the first time, pleaded that the clause of reference in the regulations was not binding, and that the petition to the Sheriff was incompetent. To-day, after hearing counsel on the note of advocacy,

The Lord Justice-Clerk said the claims of Mr Campbell were properly claims of damage, which in the ordinary case would fall to be adjudicated on by the courts of law; but here it was said the jurisdiction of these courts was ousted by a reference contained or incorporated in Mr Campbell's feu-contract subjecting all disputes in regard to his rights under the contract, at all events the disputes set out in the petition, to the decision of arbiters to be named by the Sheriff of the county. Upon the soundness of that contention he (the Lord Justice-Clerk) held a very clear opinion. It was settled law that the jurisdiction of the ordinary tribunals of the county could never be ousted in regard to a *lis* or proper legal con-

troversy by a reference to arbiters unnamed. On that short view, therefore, the application to the Sheriff was incompetent. He was further of opinion, that even had the reference been a legal one, it did not embrace the dispute in question. At the same time, while the petitioner had quite mistaken his remedy, the advocates had, in the inferior Court, taken up an equally erroneous defence. It was only when they came here that the plea of incompetency was stated. He (the Lord Justice-Clerk) was, therefore, for finding no expenses due to either party.

Lords Cowan, Benholm, and Neaves concurred.

The Court, therefore, advocated the cause, recalled the Sheriff's interlocutors, and dismissed the petition as incompetent, finding no expenses due to either party in either Court.

NIMMO v. MURRAY'S TRUSTEES.—June 3.

Trust—Construction—Heirs and Successors.

By trust disposition and settlement, dated 3d April 1855, the late James Murray conveyed all his property, heritable and moveable, to trustees, for certain specified purposes. After providing for the payment of debts and legacies, the testator directed his trustees to make payment to his wife, in case she should survive him, during her life, of the whole interest and produce of the free residue of the trust estate, and 'for payment, after the death of my said wife, of the principal sums of capital which shall compose the said residue of my said means and estate, to such person or persons as I may hereafter direct the same to be paid by any writing under my hand, whether the same shall be formal or not; and, failing such direction, then to my own nearest heirs and successors.' The testator died domiciled in Scotland, on 7th July 1855, without leaving any direction as to the disposal of the fee of the residue of his trust estate beyond that contained in the trust deed. He was survived by his widow, who is still alive, by his brother William Murray, and by Janet Garvie, granddaughter of the testator's deceased sister, Mrs Susan Murray or Garvie.

William Murray died on 29th June 1857, leaving a will and deed of indenture, whereby he assigned and made over all right and interest competent to him in the fee of the residue in favour of the pursuer, William Nimmo, who now raised this action of declarator and accounting against James Murray's trustees, and others supposed to be interested in the trust estate. The pursuer pleaded that, upon a sound construction of the trust deed, the right to the fee of the whole residue of the trust estate was thereby (in the event, which happened, of the truster leaving no other testamentary writing) destined to, and became vested, at the period of the truster's death, in his brother William Murray, as his heir and sole next of kin then surviving; and that in virtue of William Murray's will, his whole right and interest in the trust estate was transferred to, and was now vested in, the pursuer. Two questions were discussed before the Lord Ordinary—1st, whether this fee of the residue vested in the nearest heirs and successors of the testator at his death, or did not vest in any one till after the death of the present liferentrix; 2d, assuming that the fee of the residue vested *a morte testatoris*, who are to be held as the nearest heirs and successors of the testator at that period? The Lord Ordinary (Lord Mackenzie) held—(1) that the fee of the residue vested at the period of the testator's death; (2) that the testator having

survived the passing of the Moveable Succession Act, 1855, 18 Vict., c. 23, the nearest heirs and successors *in mobilibus* at the testator's death were William Murray, the brother, and Janet Garvie, the granddaughter of the testator's deceased sister, so that the fee of the residue vested in these two persons in equal shares.

The parties having reclaimed, the case was advised to-day, when the Court unanimously adhered to the Lord Ordinary's interlocutor. In regard to the first point, their Lordships thought it was almost too clear to admit of doubt that the succession vested *a morte testatoris*; and in regard to the second, they were of opinion that the words 'heirs and successors' must be construed as flexible terms, intended to designate the persons who by law would be entitled to succeed in a case of intestacy, and that although the settlement in question was executed before the passing of the Intestacy Succession (Scotland) Act, yet as the testator had survived that date, he must be presumed to have been aware of the change in the law, and to have meant by 'heirs and successors' the persons entitled to that character according to law as at the date of his death.

BAIN AND PURDIE v. BROWN.—June 3.

Promissory Note—Fraud—Novation.

This was an advocacy from the Sheriff Court of Roxburghshire. Bain, a cattle-dealer, had frequently obtained pecuniary accommodation through Brown, the accountant of the Royal Bank at Galashiels. In March 1860, Bain wrote to Brown as follows:—'Dear Sir,—It is likely that I will overdraw my account at present, as I am going to give the factor an order for L.67, 3s. I want it to hang over till the middle of April, when I commence dealing.—I am, etc.'—In reply, Brown sent him a shilling bill-stamp, directing him to get Purdie, the other defender, to sign it, and that he would 'write it out at one day's date.' Bain returned the stamp with the instruction, 'Make it at four months.' The note, as produced by Brown, runs thus:—'Westhouses, 17th March 1860.—L.100.—One day after date, I promise to pay to the order of Mr John Purdie, within the Royal Bank of Scotland's office, Galashiels, one hundred pounds sterling, for value. (Signed) JAMES BAIN.' Indorsed—'Pay to Mr John Brown or order. (Signed) JOHN PURDIE.' On receiving this note, the pursuer averred that he advanced L.100 to Bain, and deducting the interest of four months, lodged L.98, 4s. 8d. to his credit on the 17th March. On 21st July, Bain wrote to pursuer—'I think the L.100 falls due at this time. As I still need the money, I leave to you to put it all right.' The pursuer then applied for and obtained a renewal of the promissory note in the following terms:—'Pavilion Cottage, 20th July 1860.—L.100.—One day after date, I promise to pay to the order of Mr James Bain, within the Royal Bank of Scotland's office, Galashiels, L.100 sterling for value.' (Signed) 'JOHN PURDIE.' Indorsed 'Pay Mr John Brown or order.' (Signed) 'JAMES BAIN.' The pursuer unsuccessfully demanded payment of Bain in January 1861 and the succeeding months, and in July of the same year he applied to Purdie. Both defenders denying liability, in August 1861 Brown raised an action against them in the Sheriff Court, concluding for payment of 'a sum of L.100 contained in a promissory note; etc., dated 17th March 1860, . . . which promissory note was renewed to the pursuer by the de-

fenders on the indorsation of the said James Bain on the 20th day of July 1860.' Bain, among other defences, averred that the L.98, 4s. 8d. had been paid into the bank by himself. The Sheriff-Substitute (Russell) allowed a proof upon this point, and finally decerned against the defenders, and the Sheriff-Depute (Rutherford) adhered. The defenders having advocated, Bain pleaded—1. That the pursuer having, as the servant of the Royal Bank, fraudulently obtained possession of the blank note stamps, had no title to sue. 2. That the first note only was libelled, and was discharged by novation. 3. That, even if not discharged, it was altered from the terms authorized by Bain. 4. No value. Besides these defences, Purdie pleaded—(1) That he had received no notice of dishonour, to which he was entitled as indorsee of the first note, which alone was libelled; and even if the second note of which he was the maker were held to be libelled, it appeared from 'Chitty on Bills' and the English decisions that the maker of an accommodation-note was entitled to notice, if it was known to the holder that he was only a surety; (2) That Purdie having become indorsee of the second note more than one day after date, by the Mercantile Law Amendment Act, 19 & 20 Vict., c. 60, sec. 16, Purdie could plead against him the exception of want of value which he could have placed against Bain.

The Court unanimously adhered to the Sheriffs' judgment.

SHARP v. THOMSON AND BRAID.—June 8.

Interdict—Use of Road.

Mrs Sharp, West Bath, Culross, presented a petition in the Sheriff Court of Fifeshire against David Thomson, Kinghorn, and Thomas Braid, Auchtertool, setting forth that she was proprietrix of certain subjects on the east or north-east side of the main street of the village of Auchtertool, consisting of dwelling-houses and garden; that the respondent, Mr Thomson, was proprietor of certain houses and garden ground on the east or south-east of the petitioner's subjects; that access was obtained to said subjects from the main street by a road or passage of from 7 ft. 2 in. to 7 ft. 5 in. in breadth; that the respondent, Mr Thomson, although he had no right of cart-road by this passage to his subjects, had lately by himself, and by and through Thomas Braid, one of his tenants, persisted in taking carts along the said space; and praying that the respondents and all others should be interdicted from using the said space or passage as a cart-road.

The Sheriff-Substitute allowed a proof of the use and possession of the road in question during the seven years preceding 1861. Thereafter, on the 27th January 1863, he pronounced an interlocutor, finding that, though it was not denied that the respondents had a right of ish and entry by said road as a footpath, they had failed to prove that they had used it as a cart-road, as they now claimed a right to do, for the seven years. He therefore repelled the respondents' plea, sustained the petitioner's right to sue the action, and found her entitled to the benefit of a possessory judgment to the extent of preventing the respondents, and others for them, from using said road as a cart-road, and granted the interdict as craved.

The Sheriff, on appeal, adhered.

The respondents in the inferior Court advocated ; but to-day the Court adhered to the judgment of the Sheriffs.

M.P., COCKBURN'S TRUSTEES v. COCKBURN AND OTHERS.—June 10.

Succession—Residue—Construction.

This was an action raised by the trustees of the late Baron Cockburn, to determine who had right, under the trust disposition dated in 1814, to the residue of the trust estate which now fell to be distributed. The Lord Ordinary, on 7th July 1863, pronounced an interlocutor finding, 'on a sound construction of the trust deed of Baron Cockburn—1st, That it was his intention that the division of the residue of his estate, thereby dealt with, should take place at the ceasing and expiry of the liferents thereof as thereby provided, and that such division should be made among parties holding the character of heirs and executors of the truster, combined with the character of being then resident in Scotland, to the exclusion of parties as near or nearer in blood to the truster, if not resident in Scotland at the period of such ceasing and expiry of the said liferents as aforesaid; 2d, That the said Baron Cockburn did not die intestate as respects the residue of his said estate.'

Against this interlocutor Sir D. Dundas reclaimed.

The case was advised to-day, when the Court adhered to the interlocutor of the Lord Ordinary, holding that Baron Cockburn did not die intestate, but that the residue of his estate fell to be distributed in terms of his will, on the principle stated by the Lord Ordinary.

Adv., RANKEN v. GALLOWAY.—June 11.

Agents' Charges—Table of Fees.

Certain property in Glasgow is held feu of Mr Campbell of Blythswood under a form of feu-right which prohibits sub-infeudation, but allows division of the feu at proportional rates of feu-duty, the feu-duty being augmented, in the event of division, according to a certain scale. Confirmation by the superior of all alienations is further required within a certain specified time. The respondent, Mr Galloway, having purchased from the Western Bank of Scotland a portion of this property, possessed by them, it was necessary for the completion of his title to have the disposition in his favour confirmed by the superior. This deed, being the writ of confirmation, fell to be prepared by the agent of the superior, and paid for by the vassal. The disposition was accordingly forwarded by Mr Galloway's agent to Mr Jonathan Ranken, with instructions to prepare and engross thereon a list of confirmation by Mr Campbell. Application was then made to Mr Ranken for delivery of the deed and writ of confirmation, and a tender was made to him of L.6, 9s. 6d. as his proper business charges, according to the table of fees in use by the Faculty of Procurators in Glasgow, of which Faculty Mr Ranken is a member. Mr Ranken refused to deliver the deed and writ of confirmation except upon payment of L.9, 12s. Mr Galloway then presented a petition in the Sheriff Court of Lanarkshire, praying for delivery of the completed deed, and pleading that the sum tendered by him was the full amount of fees exigible by Mr Ranken, who, as member of the Faculty of Procurators, was bound by the table of fees sanctioned by the Faculty. Mr Ranken pleaded that the alleged table of fees founded on by the

petitioner was *ultra vires* of the Faculty, and in excess of the powers conferred upon them by their charter, and denied that he was bound by said table. He further pleaded that the alleged table of fees did not embrace a deed of the description of the writ in question, and that he was willing to submit his charges, which he maintained to be fair and reasonable; to be taxed by the Auditor of the Court of Session.

The Sheriff-Substitute (H. G. Bell), on 20th January 1863, found that the defender, Mr Ranken, was bound by the said table of fees, and was not entitled to insist on any higher rate of charge than was there sanctioned, and ordained him to deliver up the deed as prayed for, the Clerk of Court being at the same time authorized to pay over to him the sum of L.6, 9s. 6d., which the petitioner had consigned.

The Sheriff, on appeal, adhered.

Mr Ranken advocated. On 12th February 1864, the Court recalled the interlocutors complained of; found that the advocator was entitled to retain the disposition belonging to the respondent, with the writ of confirmation engrossed thereon, until he should receive payment of a reasonable remuneration for the preparation and engrossing of the said writ; that the table of fees relied on by the respondent was not binding on the advocator; that there was no ground for holding that there was any implied contract between the parties that the advocator should accept payment of his remuneration according to said table of fees, and remitted to Mr T. G. Murray, W.S., to report what, in the circumstances, and according to general practice, would be a fair and reasonable amount of remuneration to the advocator for his professional services. Mr Murray reported that the sum of L.9, 8s. 8d. would be a fair remuneration to the advocator, on the principle of an *ad valorem* charge on the rental of the property purchased by the respondent.

To-day the case was advised, when the Court approved of the report, and found that the charge suggested in the report was a fair and reasonable charge.

Pet., STEWART v. CHALMERS.—June 14.

Sequestration—Election of Trustee—Nobile Officium.

On 19th February 1864, the estates of John Chalmers, tenant of the farm of Upper Auldtown, in the parish of Boharm, were sequestrated by the Sheriff of Banffshire, and a meeting of the creditors of the bankrupt was appointed by the Sheriff to be held on 4th March 1864, to elect a trustee. It appeared from the state of affairs made up by the bankrupt that the only property or effects belonging to him consisted of the lease of the farm, and the stocking and effects thereon, and that the bankrupt was in arrear with his rent. Under these circumstances, the creditors attending the meeting resolved that as the whole assets of the bankrupt were preferably available to the landlord under his right of hypothec, they had no interest to proceed with the sequestration, and therefore resolved to abandon it, and not to elect a trustee. Mr Stewart of Auchlunkart, the bankrupt's landlord, did not lodge any claim in the sequestration, and did not attend the meeting for the election of a trustee; but on the 9th of April following that meeting presented a petition to the Sheriff, praying him to appoint a new meeting to be held. The Sheriff refused to grant

the prayer of this petition, on the ground that he had no power under the statute to do so. Thereafter Mr Stewart, the landlord, presented the present petition, addressed to the Court of Session and the Lord Ordinary on the Bills. The Lord Ordinary on the Bills appointed the petition to be intimated to the bankrupt, and to be boxed to the Inner House. Answers having been lodged, counsel were heard, when the respondent having contended that the *nobile officium* of the Court could not be exercised on an application originating in the Bill Chamber, the Court appointed the petition to be intimated anew. This having been done, the case came again before the Court to-day, when, after hearing counsel, the Court appointed another meeting to be held for the election of a trustee.

The petitioner asked for expenses, but the Court refused to grant any.

INSPECTOR OF DUNDEE v. INSPECTOR OF SOUTH LEITH.—June 14.

Pauper—Liability for Relief.

The Inspector of Poor of the parish of Dundee brought an action in the Sheriff Court of Edinburgh against the Inspector of Poor of the parish of South Leith, concluding for the sum of L.54, being the board and aliment advanced by the pursuer, as inspector foresaid, for behoof of Felix Scott, a pauper, whose birth settlement is in the last named parish. The pursuer averred that in December 1851 application was made to the Parochial Board of Dundee for relief on behalf of the boy Scott; that relief was given up till October 1857; and that on 3d January 1863 the pauper again became chargeable, and was presently in the Dundee poor-house. That about the first period of the chargeability, on 26th December 1851, the pursuer, in terms of the 71st sec. of the Poor-law Amendment Act (1845), sent to the defender written notice of the chargeability, and also full particulars of the case, including the locality where the boy was born, and stating that relief would be claimed from the parish of South Leith for future advances on behalf of the boy. He further averred that when the pauper became chargeable the second time, this was intimated by letter of 11th February 1862 to the defender, who never answered the statutory communication made by the pursuer, and never objected to liability in the relief claimed until June 1862. He pleaded that the pauper having had a settlement in the defender's parish all along, the defender, having received the statutory notices in December 1851 and February 1862, was liable, under the Act 8 & 9 Vict., c. 83, to repay to the pursuer the sums advanced; and that the defender, having failed to answer or acknowledge the statutory notice of chargeability, must be held to have acquiesced in the claim of relief raised by the notice. The defender admitted receipt of notice and claim in 1851.

The Sheriff-Substitute (Jameson) gave judgment for pursuer, which judgment was, on appeal, reversed by the Sheriff, who found that the claim of the pursuer was barred alike by failure in sufficient notice and by *mora*. The pursuer advocated; but to-day the Court adhered to the judgment of the Sheriff, holding that, when the first notice was given, the child had no claim against the parish of South Leith, and no claim against any parish except through his father. If the notice had been answered, that would not have made it a good notice. The Inspector of South Leith was not legally entitled to admit the claim, and it could not be held that the notice became good by not being answered.

BARR v. EDINBURGH AND GLASGOW RAILWAY COMPANY.—June 17.

Remuneration for Services—Proof—Prescription.

John Barr, contractor and shipowner, Ardrossan, raised this action against the Glasgow, Dumbarton, and Helensburgh Railway Company (now amalgamated with the Edinburgh and Glasgow Railway Company) to have it found that they were bound to make payment to him of L.80 sterling, being the amount of an account incurred to the pursuer on the employment of the promoters of the said railway, for time occupied and expenses incurred in preparing himself for, and going to, London to give evidence in May and July 1855, before the House of Commons and the House of Lords, in support of the bill for said railway. In his condescendence he averred that he was employed by the promoters of the bill as a witness; that before going to London he carefully examined the proposed line, made estimates of the probable expense, and made himself master of the whole interests which the railway would probably affect, so as to be able to give evidence on all questions as to the formation of the line. The time occupied in the preparation amounted, he said, to upwards of six days, for which he made no separate charge. In April 1855 he went to London in consequence of a letter from the secretary of the promoters, recommending him to leave for London not later than 'Wednesday evening, as you will probably be required to give evidence the first day.' At this employment he was occupied for six days, for which he claimed remuneration, and his travelling expenses, amounting together to L.40. He made a similar claim of L.40 for six days' employment in the month of July. The defenders denied the employment, and averred that the services of the pursuer had been given gratuitously. They stated that their solicitors in London had, in July 1855, paid to the pursuer the sum of L.20, the amount of expenses disbursed by him on the occasion of his attendance on the Parliamentary committees. They pleaded prescription against the claims of the pursuer; and, further, that the writs founded on not being sufficient to prove the constitution of the debt sued for, prescription was not thereby elided. The Lord Ordinary (Lord Jerviswoode) found that, in respect of the nature of the employment alleged by the pursuer, and in respect of the terms of the several letters produced by the pursuer, prescription did not apply.

The railway company reclaimed, and the Court adhered.

APPEALS IN THE HOUSE OF LORDS.

CAMPBELL v. CAMPBELL.—May 30.

The Breadalbane Peerage.

This appeal was from the First Division of the Court of Session, and the question was, whether that Court was right in refusing to appoint a factor to receive the rents and administer the estates of the earldom of Breadalbane, until it be ascertained by proceedings now pending who is the true heir to the estates and earldom. The case was argued in the early part of this month, and judgment postponed. On Friday judgment was given. The Lord Chancellor and Lord Chelmsford held that the Court of Session was right, on the ground that the respondent had a better *prima facie* case than the appellant, and affirmed the decision of

the Court of Session. Lord Wensleydale was of a different opinion, but the appeal was by a majority dismissed.

YOUNG v. FERNIE.—May 30.

The Invention of Paraffin—Patent.

This suit has occupied the Vice-Chancellor Stuart's Court for thirty-three days, and related to the sole right of the plaintiff, who resides in Scotland, to the manufacture of paraffin and paraffin oil, as he claimed to be the inventor of the process. The defendant denied the right of the plaintiff to be the inventor, or to be entitled to a patent, on the ground that there was nothing new in the invention. The Vice-Chancellor gave judgment on Friday. He said that he was satisfied with the evidence given by the plaintiff's witnesses, which, in his Honour's opinion, outweighed that of the defendant's. The plaintiff had, by a course of laborious experiments, entitled himself to the advantages to be gained as the inventor of a useful manufacture. There must, therefore, be judgment for the plaintiff, with costs.

English Cases.

INSURANCE AGAINST FIRE.—A ship was insured for three months against fire, and was described in the policy 'as lying in the Victoria Docks, with liberty to go into a dry dock;' and it was held, the ship was covered while she was in the river passing from the Victoria Docks to a dry dock, and *vice versâ*, but not while she was in the river for any other purpose.—(*Pearson v. The Commercial Union Assurance Co.*, 33 L. J., C. P. 85.)

MARINE INSURANCE.—A policy was effected on guano on board the ship 'Do Hermance,' 'at and from port or ports in the River Plate to the United Kingdom, beginning the adventure from the loading thereof at as above.' The guano had been loaded on board the same ship in Patagonia, for a voyage to England: but the ship having met with sea-damage, on her arrival at Monte Video (in the River Plate), part of the guano was removed, and when she had been repaired was reloaded. The ship and cargo were sold at Monte Video, and the insurance was effected on behalf of those interested in the new voyage from that place to the United Kingdom; and it was held, that under the above circumstances the underwriters were liable to a loss between Monte Video and the United Kingdom, notwithstanding the terms of the policy.—(*Carr v. Montefiore*, 33 L. J., Q. B. 57.)

MARINE INSURANCE.—A ship and her cargo of guano were insured by the defendant, for a voyage from M. to England, in a policy which contained the following: 'free from all average or claim arising from jettison or leakage, unless consequent upon stranding, sinking, or fire. The value of L.— to be mutually admitted in adjusting or deciding all claim for loss or particular average.' In the course of the voyage the ship and cargo were damaged by rough weather, and it became necessary to put into a port, where the ship and such part of the guano as was not rendered useless by sea-damage were sold. It was held, in an action upon the policy, that the assured was not precluded from recovering in the action by reason of the words above set out.—(*Carr v. The Royal Exchange Insurance Co.*, 33 L. J., Q. B. 68.)

SALE OF GOODS.—The rule, 'that where anything remains to be done to goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted,' is not to be understood to include cases where all that remains to be done is to be done by the *buyer* with full authority from the seller, but only cases where something remains to be done by the *seller*. The intention of the parties is to be looked at in every case, and the above rule does not apply where they have sufficiently shown whether they intended the property to pass or not. *Channell, B. : In Hansen v. Meyer* (6 East, 614), the weighing was to precede the delivery, and was a condition precedent to the purchaser's right to take possession, and to a complete present right of property. In *Hinde v. Whitehouse* (7 East, 558), which was a case of a sale by auction, it was held, that though the duties to the Crown remained to be paid by the seller before possession could be had by the buyer, the property passed from the time of sale, the words of the condition showing that intention. In *Rugg v. Minett* (11 East, 210), a duty remained to be performed by the sellers; and Lord Ellenborough stated the test to be, whether everything had been done by the sellers which lay upon them to perform, in order to put the goods in a deliverable state; and Bayley, J., in effect, adopted the same test. *Zagury v. Furnell* (2 Campb. 240) is an authority to the same effect. There it was the duty of the seller to count the skins in each bale, and the price was a certain sum per dozen skins. In *Simmons v. Swift* (5 B. and C. 857), the authority most in point for the defendant, it was a part of the contract there for the sale of a stack of bark at L.9 per ton, that the bark should be weighed; and the concurrence of the seller in the act of weighing was necessary. Bayley, J., after stating the general principle, says: 'If anything remains to be done on the part of the seller, until that is done the property is not changed.' From a consideration of these cases, it appears that the principle involved in the rule above quoted is, that something remains to be done by the seller. It is therefore very doubtful, whether the present case comes within the principle of the rule. But however that may be, it is clear that this rule does not apply, if the parties have made it sufficiently clear whether or not they intend that the property shall pass or not, and that their intention must be looked at in every case. This is clearly laid down in the case of *Logan v. Mesurier* (6 Moo. P. C. 116), in *Hinde v. Whitehouse*, cited *supra*, and in *Blackburn* on the 'Contract of Sale,' p. 151.—(*Furley v. Bates*, 33 L. J., Ex. 43.)

FALSE PRETENCES.—K. represented to B. that he had a large quantity of good tobacco to sell, and induced B. to agree to buy some. P. was with K. at the time, and it was arranged that P. was to deliver the tobacco to B., and that B. was to pay P. for K. P., a few days afterwards, fraudulently delivered to B. two bales purporting to be tobacco, as in pursuance of the contract, and received payment from B. The bales contained little else but rubbish; and K. and P. being parties to the fraud, it was held that K. was liable, on these facts, to be convicted on an indictment charging him with obtaining money from B., by falsely pretending that he was possessed of a quantity of good tobacco.—(*R. v. Kerrigan*, 38 L. J., M. C. 71.)

LARCENY.—Prosecutor asked the prisoner to bring him half a ton of coals from the railway coal station, and gave him 8s. 6d. to pay for them. The prisoner bought half a ton of coals at the station in his own name, paying 8s., and having credit for the remaining 6d. He put the coals into his own cart, and on his way abstracted a hundredweight of the coals, and afterwards delivered the residue to the prosecutor as the coals which he had required. The prisoner was not in the prosecutor's employment. It was held, the prisoner was guilty of larceny as a bailee, some of the judges thinking that the coal being

purchased with money given by the prosecutor for that express purpose, the property in the coal vested in the prosecutor on the purchase; others holding that to make the prisoner a bailee there must be evidence of a specific appropriation of the coal to the prosecutor; and all the Court agreed that there was evidence on the facts of such an appropriation.—(*R. v. Bunkall*, 33 L. J., M. C. 75.)

BILL OF SALE.—A., by deed, assigned to B. all the machinery in and about a certain mill, upon trust for securing a sum of money; and it was thereby provided, that all the machinery which, during the continuance of the security, should be fixed or placed in the mill, in addition to or substitution for the former machinery, should be subject to the trusts of the assignment, and A. undertook to do all that was necessary to vest the substituted and added machinery in B. The assignment was duly registered as a bill of sale, and, after the date of it, A. placed other machinery in the mill, in addition to that which was there at the date of the assignment, and gave notice to B. of each substitution and addition. A. continued in possession according to the terms of the assignment. Vice-Chancellor Stuart held, that the machinery being in A.'s possession, as agent of B., B. was entitled, as against a judgment creditor of A. who had sued out execution against A. to the additional machinery; but this decision was reversed by Lord Chancellor Campbell, on the ground of A.'s possession not being sufficient to support B.'s claim, and on the ground that to give B. the complete title to the substituted and added machinery, it was necessary that there should be a *novus actus interveniens*. The House of Lords, on appeal, reversed the Lord Chancellor's judgment, and restored that of Vice-Chancellor Stuart.—(*Holroyd v. Marshall*, 33 L. J., Ch. 193.)

CHARITY.—Testator, by his will, gave his estate in L. to two colleges for the only use, education in piety and learning of four of the descendants of his brothers and sisters, and three of the descendants of the brother and sister of his first wife, and three of the descendants of the brothers and sisters of his second wife, and in default of such, to their next of kindred, for the first by the father's side, for the second by the mother's side; 'and the lease of the said L. to be at one-third part under true value to my said wives' kindred, ever, viz., brothers and sisters, there and at Harrow.' The colleges entered into possession of the estate, and leases were granted in accordance with the direction for upwards of 200 years. Upon an information filed at the relation of one of the colleges, it was held that the estate was devised to the colleges absolutely for charitable purposes; and that the direction to lease to the kindred was void, as amounting to a perpetuity. Also, that a single defendant to whom leases had been granted in accordance with the direction, sufficiently represented all parties interested under the direction to lease; and that the decision being in favour of the colleges, a decree might be made, although one only of the two colleges was before the Court.—(*The Attorney-General v. Greenhill*, 33 L. J., Ch. 208.)

EASEMENT.—The doctrine that where an owner of two properties conveys one of them to a purchaser, a reservation or re-grant will be implied in favour of the owner of all those continuous and apparent quasi-easements which are necessary for the due enjoyment of the property retained, approved by the Master of the Rolls; but, on appeal, denied by the Lord Chancellor to be law. If the owner of two adjoining tenements conveys one of them to a purchaser absolutely, the tenement so sold is discharged from any quasi-servitudes to which it was subjected by the vendor during his ownership of both properties, and the purchaser is not bound to take notice of the manner in which the tenement purchased has been used for the convenience of the adjoining and unsold tenement—so held by the Lord Chancellor.—(*Pyer v. Carter* questioned.—*Suffield v. Brown*, 33 L. J., Ch. 249.)

TRADE-MARK.—The grounds on which a Court of equity interferes to pro-

test the enjoyment of a trade-mark examined. Though there is no exclusive ownership of the symbols which constitute a trade-mark apart from the use or application of them, yet the exclusive right to use such mark in connection with a vendible commodity is rightly called property, and the jurisdiction of the Court to restrain the infringement of a trade-mark is founded upon the invasion of such property, and not upon the fraud committed on the public; and see *Hall v. Barrows*, p. 204. *Per Curiam*—The Court will not interfere for the protection of a trade-mark, unless the mark used by the defendant is applied by him to the same kind of goods as the goods of the plaintiff, and is such that it may be and is mistaken in the market for the trade-mark of the plaintiff. If a trade-mark contain a material misrepresentation as to the character of the goods to which it is applied, the Court will not interfere to protect the use of it, even though the misrepresentation should be so obvious that no purchaser would be deceived.—(*The Leather Cloth Co. (Lim.) v. The American Leather Cloth Co. (Lim.)*, 33 L. J., Ch. 199.)

BANKRUPTCY.—A bankrupt accepted accommodation bills without consideration, to an amount far beyond his means or expectations, for a firm in large business, to whom he was under considerable obligations, and whom he believed to be perfectly solvent; and it was held, affirming the decision of the Commissioner, that his conduct amounted to a contracting of debts without reasonable or probable ground of expectation of being able to pay the same within the 159th section of the Bankruptcy Act, 1861, and his order of discharge was absolutely refused.—(*Ex parte Barker, re Barker*, 33 L. J., B. 13.)

CARRIERS BY RAILWAY.—Conditions annexed by a railway company to their 'cattle-tickets,' that 'the company are to be free from all risk and responsibility with respect to any loss or damage arising in the loading or unloading, or injury in the transit from any cause whatever, it being agreed that the animals are to be carried at the owner's risk,' and that 'the owner of the cattle is to see to the efficiency of the waggon before his stock is placed therein, complaint to be made in writing to the company's officer before the waggon leaves the station,' are (on the authority of *M'Manus v. The Lancashire and Yorkshire Railway Company*) neither just nor reasonable.—(*Gregory v. West Midland Rail Co.*, 33 L. J., Ex. 155.)

CONTRACT.—To a count for not accepting goods described in the contract as 'to arrive *ex* "Peerless" from Bombay,' a plea that defendant meant another ship of the same name, which sailed from Bombay two months earlier, and that plaintiff was not ready to deliver any goods which arrived by that ship, was held on demurrer to be a good answer.—(*Raffles v. Wichelhaus*, 33 L. J., Ex. 160.)

EQUITABLE PLEA.—To a declaration on a contract for the sale of 150 cases of oil by plaintiffs to defendants at a certain price per gallon, to be cleared and paid for in fourteen days, alleging as a breach, that, although defendants had cleared a portion of the cases, they had not cleared the residue, nor paid for the cases, according to the contract,—the defendants pleaded, by way of equitable defence, that the contract did not relate to any specific cases of oil, but was a contract that the cases of oil should agree with a certain sample then shown to defendants, and that the brokers, who negotiated the contract, and afterwards wrote out the bought and sold notes, by mistake omitted to state that the cases of oil were to agree with the sample, and that through inadvertence the mistake was not discovered till long after the fourteen days, and after defendants had cleared the portion of the cases so alleged to have been cleared by them; that the only cases which plaintiffs were ready and willing to sell did not agree with the sample, and were of less value, and that as soon as the defendants discovered this they gave notice to the plaintiffs of their refusal to be bound by the contract. It was held, on demurrer, a good plea, as the contract had been put an end to by the default of plaintiffs, and it would be useless for a court of equity to reform it.—(*Borrowman v. Russel*, 33 L. J., C. P. 111.)

FOREIGN ENLISTMENT ACT.—The mere building of ships, as distinguished from equipping, is not prohibited by 59 Geo. III., c. 69, s. 7. The equipment forbidden by that section is an equipment of a warlike character, by means of which the ship on leaving her Majesty's dominions shall be in a condition to cruise or commit hostilities; so held by Pollock, C. B., and Bramwell, B. But held by Channell, B., that the statute forbids an equipment for war, but that an equipment *ancipitis usus*, capable of being used for war, is within the meaning of the 7th section, provided the intent be clear that it is to be used for war; and by Pigott, B., that the prohibited intent is the main ingredient of the offence struck at by the statute, and that any act of equipping, done in furtherance of that intent, constitutes the whole offence.—(*Attorney-General v. Sillem* (the 'Alexandra' case), 33 L. J., Ex. 92.)

FREIGHT.—S. and F., who were owners of a ship, mortgaged her to the plaintiff as security for a sum of money lent to them, and they also assigned to him all the freight, etc., to be earned by the ship, and authorized him to recover all sums of money which were or might become due for freight and earnings of the said ship. In October 1857, S. and F. arranged with I. and Co. for a purchase of timber in Cuba, to be supplied by T. and Co., and to be sent home in the ship, and for which they gave a letter of credit on M. and Co., of the 'Havanna,' undertaking to accept their drafts for the cost of the cargo, upon presentation, against the shipping documents to be sent to I. and Co. Owing to delays during the voyage out, the timber had been disposed of before the ship reached her port in Cuba. The captain, however, purchased through T. and Co. a cargo of wood on account of his owners; and, on receiving it on board, he gave to T. and Co. a bill of lading, by which he bound himself 'to deliver in the like good order in the said port, or in such other my manifest may appoint, to order — who — on faithful delivery thereof being shown, shall pay me for freight and conveyance.' The bill of lading contained no specified sums as freight, but opposite the descriptions of each of the different parts of the cargo was a blank space which had been filled up by a line. T. and Co. sent to M. and Co. an invoice of the goods shipped 'by order of M. and Co. of the "Havanna," and for account of risk of whom it may concern.' M. and Co. paid the amount of the invoices in their account current with T. and Co., and drew on I. and Co. for the amount, and sent the bill of lading to them. I. and Co. refused to honour the bills, and in consequence M. and Co. arranged with the defendant to accept and take them up for the honour of the drawer. He did so, receiving at the same time the bill of lading. S. and F. became bankrupt. S. and F. took possession of the ship and cargo when they arrived at Gravesend, and the cargo was afterwards claimed by the defendant as the holder of the bill of lading. The cargo was sold by the defendant; and upon an interpleader issue to try whether the plaintiff was entitled to recover freight, it was held that he was so entitled, inasmuch as, under the circumstances, and supposing that there was no mortgage at all, S. and F. would have been entitled to freight.—(*Gumm v. Tyrie*, 33 L. J., Q. B. 97.)

MARINE INSURANCE.—A cargo of bacon was insured from Liverpool to New York by a policy containing the exception, 'warranted free from average, unless general or the ship be stranded, sunk or burnt,' and the suing and labouring clause in its ordinary form. The ship in the course of its voyage was disabled, and the cargo discharged. Part of the bacon was condemned and sold, and the remainder sent on in two vessels; all which was proper under the circumstances. It was held, that neither the extra freight incurred by reason of the transshipment, nor the cost of warehousing, surveying, and cooerage of the goods, could be recovered under the policy.—(*Booth v. Gair*, 33 L. J., C. P. 99.)

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RAILWAY LEGISLATION.

THE parliamentary session of 1864 has all but passed away; and it would be difficult to point to one measure of general public importance as the result of its deliberations. No Act has been passed which seems likely to affect, to any great extent, the general interests of the nation; and, so far as domestic policy is concerned, we are not aware that any Bill has been introduced, or discussion raised, which has been sufficiently important to awaken among the general body of the people either wide-spread approval or censure. Several enactments have, doubtless, entered the statute-book, the operation of which will be beneficial, or the reverse, in those parts of the empire, or in those departments of trade and commerce, for whose sake primarily they have been passed; but, as a whole, the session has not been remarkable for any great public act of legislation. While this is so, however, the session now closing has been abundantly prolific in what is usually called 'private Bill legislation;' and not a few members of either House, who would find it difficult to justify their claims to the gratitude of their constituents or of the country, on the ground of the part which they have taken in debates, or in any of the more *visible* work of Parliament, have, in fact, been engaged in the Committee Room from day to day in work of the most laborious and tedious nature, and on the performance of which, honestly and ably, there often depends not only an incredible amount of private wealth, but the commercial prosperity and development of large portions of the kingdom. At the close of a session in which so much work has been done by, and so great interest has attached to the deliberations of, parliamentary committees, our

readers may not be unwilling to be furnished with some account of their functions, and of the mode in which these are discharged, while we shall perhaps be tempted to advert to some matters in which the experience of the last and of previous sessions seems to suggest room for modification and improvement, in this mode of parliamentary inquiry.

A private Bill is a measure introduced for the particular interest or benefit of any person or persons, and generally has for its object the conferring of powers and privileges upon those who petition for it, to which by the common law of the land they would have no right, and which they could not exercise. Under this definition we include Bills for such local and personal Acts as, although declared public for certain purposes, are promoted by private individuals, and are private in their scope and purpose.

In passing public Bills, Parliament acts strictly in a *legislative* capacity; but in the case of private Bills, although still exercising its legislative functions, its proceedings partake more of a *judicial* character. In the early constitution of Parliament, these two classes of functions were confounded; and special laws for the benefit of private parties, and judicial decrees for the redress of private wrongs, were not distinguished in principle or in form. When the remedies or the powers sought from Parliament were obviously such as the common law afforded, the parties were referred to the ordinary tribunals, and gradually, as the province of courts of law and equity became better understood and more clearly defined, petitions addressed to Parliament prayed distinctly for peculiar powers for the special benefit of the petitioners, which under the existing law could not have been conferred or sanctioned by the law courts. Whenever these were granted, the orders of Parliament, however expressed, were of the nature of *private Acts*. But it is sufficiently obvious that a measure of this kind, being, as we have explained, for the particular benefit of certain persons, may, and probably will be injurious to certain others; and judicial inquiry and determination must be exercised in order to discriminate between the conflicting interests of the different parties. It is true that in the case of public Bills, an individual or individuals may petition for or against a measure, and may in some instances be heard by counsel, but they have no direct participation in the conduct of the business. Such measures are originated by Parliament itself, because they seem for the public good: it insti-

tutes its own inquiries in its own way, and the representations or interests of private individuals are not supposed to have much immediate influence on the judgment at which it arrives. In private Bills, on the other hand, although Parliament still acts as the guardian of the general good of the state, the proceedings partake to a large extent of the nature of a judicial suit in an ordinary legal tribunal. The persons whose private interests are to be promoted, appear as suitors for the Bill, while those who apprehend injury are admitted as adverse parties in the suit. Many of the formalities of a court of justice are maintained; various conditions are required to be observed, and their observance strictly proved; and if the parties do not sustain the Bill in its progress, by following all prescribed forms and regulations, it is not forwarded by the House in which it is pending. If they abandon it, and no other parties undertake its support, the Bill is lost, however sensible Parliament may be of its value. So completely *judicial*, as opposed to *legislative*, are proceedings in private Bills held to be, that the promoters have been restrained by injunction, issued from the Court of Chancery, from proceeding with a Bill, the object of which was held to be to set aside an agreement, and parties have been restrained in the same way from appearing as petitioners against a private Bill pending in the House of Lords. [*North Staffordshire Railway Co.*, 5 Railway Cases, p. 691; *Hartlepool Junction Railway*, 100 Hans. Deb., 3d Ser. p. 783.]

It is true, however, as we have indicated above, that Parliament does to a certain extent, even in private Bills, watch over the interests of the public; and accordingly, although the promoters of a Bill may prove that their own interest will be advanced by its success, and although no one may complain of injury, or urge any specific objection, yet if Parliament apprehend that it will be hurtful to the community, it is rejected as if it were a public measure, or qualified by restrictive enactments not solicited by the parties. It should also be noticed that, in order to secure the vigilance of Parliament in protecting the public interests, the chairman of the Lords' Committees in the one House, and the chairman of the Committee on Ways and Means in the other, are entrusted with the peculiar care of unopposed Bills, and with a general revision of all other private Bills.

In numerous cases, as our readers are aware, special applications to Parliament for private Acts have been, in recent years, super-

seded by general laws. The policy of the Legislature, following the obvious principle that the public laws of a country ought to be as comprehensive as is consistent with the rights of private property, has been to enable parties to avail themselves of the provisions of public Acts, adapted to different classes of objects, instead of requiring them to apply to Parliament, in each particular case, for special powers. Among other statutes relating to matters which had usually been the subjects of private Acts of Parliament, may be mentioned, *the General Enclosure and Drainage Acts, the Companies Act of 1862, the General Police Acts, the Lands Clauses, the Railways Clauses Acts*, and many others. But still, in all cases in which special legislation is sought for in regard to matters not within the provisions of such general enactments, application must still be made to Parliament for a private Act. Let us sketch briefly what must be done by its promoters before it can be obtained, taking, as the best example for our purpose, the case of an opposed railway Bill.

By the privilege of the House of Commons, all Bills which involve pecuniary charge upon the Queen's subjects must originate in that House; and consequently, until the year 1858, all railway Bills were passed first in the Commons. But in that year it was resolved by the Lower House not to insist on its privileges with regard to any clauses in private Bills sent down from the House of Lords, 'which refer to tolls and charges for services performed, and are not of the nature of a tax.' Consequently, railway Bills may now originate in either House,—the mode in which they are carried through in the one House differing in no important respect from that adopted in the other.

When a petition for a private Bill is presented, the first matter in regard to which it will be scrutinized is, compliance with the Standing Orders of the House. By these Orders, parties applying for a private Bill are required to observe certain preliminary conditions;—such as notices by advertisement; notices and applications to owners, lessees, and occupiers of lands and houses; documents, plans, estimates, etc., which require to be deposited; and other matters which are set forth at length in the printed Orders of the House. Compliance with these orders is of vital importance, and is rigorously inquired into by 'the Examiner of Petitions for Private Bills.' If that official reports that they have not been complied with, his report is referred to the 'Select Committee on Standing Orders,' who report to the House whether such Standing Orders ought or ought not to be dis-

pensed with, and whether the parties should be allowed to proceed with the Bill, and under what, if any, conditions. If their report is unfavourable, the Bill is lost, and the promoters must begin *de novo* next session. When, on the other hand, the Examiner certifies that the Standing Orders have been complied with, the next step to be taken is to entrust the Bill to one or two members of the House for presentation. Prior to that being done, however, copies of the Bill must be laid before the chairman of the Committee of Ways and Means and the counsel to the Speaker, whose duty it is to examine the Bill, and call the attention of the House to such points as may seem to them to require notice. When leave has been given to bring in the Bill, it is read a first, and afterwards a second time; and then stands referred, if not a railway or canal Bill, to the 'Committee of Selection;' and if a railway or canal Bill, to the 'General Committee on Railway and Canal Bills.' This last-named General Committee consists of about eight members, nominated at the commencement of the session. Its functions are to form the various Bills which have been presented, into groups, and to appoint the chairman of every committee from its own body,—one main object of its constitution being to ensure a communication between the several chairmen, and uniformity in the decisions of the committees. The Committee of Selection consists of the chairman of the Standing Orders Committee and of five other members, nominated by the House at the commencement of every session.

By No. 7 of the Standing Orders, it is provided that the committee on every opposed railway and canal Bill shall be composed of five members, not locally or otherwise interested in the Bill or Bills referred to them; the chairman to be appointed by the General Committee as above mentioned, and four other members by the Committee of Selection. Each member of committee, before he is entitled to attend and vote, is required to sign a declaration 'that his constituents have no local interest, and that he has no personal interest,' in the Bill; 'and that he will never vote on any question which may arise, without having duly heard and attended to the evidence relating thereto.'

The first duty imposed upon all committees on private Bills, is to examine the allegations contained in the *preamble* of the Bill. That is to say, parties coming before Parliament in order to obtain its aid and authority for carrying out some specific objects, must in the first instance substantiate their claim to such aid and autho-

rity, and prove the expediency of effecting the objects proposed; and this has to be done although there be no opposition. In the case of a *public* Bill, on the other hand, framed to meet public exigencies, no *proof* is required of any specific fact as the ground for legislation: in that case, therefore, the preamble is invariably postponed, and when the clauses have been gone through, the question is put on the preamble, 'that this preamble stand part of the Bill;' or, if it be necessary, the preamble may be amended previously to such question being put, in order to adapt it to the clauses which have been agreed to. If the preamble be proved to the satisfaction of the committee, they go through the Bill, making such amendments as seem fit, and report the same to the House. When the preamble is found not proved, the finding is reported to the House, and there all proceedings with reference to the measure are at an end.

In considering an opposed Bill, the committee have before them the following materials to enable them to come to a decision upon it: The Bill, as printed and read a second time in the House; the petitions against the Bill, which have been referred to them by the House; and the plans and other documents relating to the measure, which have been previously deposited, in conformity with the Standing Orders. Having settled preliminary questions, *e.g.*, of *locus standi* to oppose the Bill, it becomes the duty of the committee to hear counsel open the case on behalf of the promoters. Evidence will then be called in support of the preamble—the witnesses being examined in chief and cross-examined, as in an ordinary legal tribunal; and when that is concluded, the counsel for the Bill addresses the committee on behalf of the promoters. Counsel for the petitioners against the measure are next heard, and evidence led in the same way. The room is then cleared, that the committee may decide upon the preamble. If the preamble is agreed to, parties are again called in, and the committee proceeds to consider the clauses of the Bill, evidence being led on each opposed clause. The committee may make amendments either on the preamble or on the clauses; but they are limited, first, by the title of the Bill and the Order of Leave,—that is, the order of the House previous to the introduction of the Bill: 'That leave be given to bring in a Bill for making a railway,' etc.; and, second, by the Standing Orders, which prevent any new matter from being introduced, that will require the proof of any Standing Orders having been complied with, other than those which have been proved before the com-

mittee. On the Bill being reported to the House, all amendments which are not merely literal or verbal must be mentioned in the report. A certificate must then be obtained from the chairman of the Committee of Ways and Means, that the Bill, as amended, contains all the provisions required by the Standing Orders, and notice of any clause which it is intended to bring up, or any amendment which is to be proposed on the motion for the third reading, must be given. The proposed amendments will be submitted to the Standing Orders Committee; and if they report favourably, they will probably be allowed, or, if of importance, the Bill will be recommitted. When read a third time, the Bill must be printed, and, before it is sent to the Lords, must be examined by the clerks in the Private Bill Office.

Our account of the duties imposed upon committees would be incomplete, if we did not notice that, in the case of railway Bills, they are, by the Standing Orders, required specially to see that certain clauses are introduced into the Bill, and also specially to report on a variety of points. For a complete enumeration of these, we must refer to the Standing Orders themselves; but an idea of their general scope may be gathered from the statement of one or two. The committee are to report specially to the House the proposed capital of the company, and the proposed amount of loans; the amount of shares subscribed for, and the deposits paid thereon; the names and residences of the directors, and the amount of their respective shares; the merits, in an engineering point of view, of the proposed railway; the character of the gradients and curves; the number, extent, and means for ventilation of the tunnels; the degree of favour or objection with which the project is regarded by the landowners and others in the neighbourhood of the undertaking; and the principal allegations of every petition in opposition to the Bill. The committee are further to fix the tolls and the maximum rates of charge for the conveyance of passengers and goods, and to take care that the provisions of the Bill do not alter the terms of any existing preference stock.

Having got through the House of Commons, a railway Bill has yet to undergo the ordeal of an investigation by the Upper House. If at this stage of the measure any alteration is made on it, elaborate notices must be given to various public officers in the district of the proposed railway, and in the *Gazette*, at least a month previously to the introduction of the Bill into the House of Lords, and

the Examiner must be satisfied that the change is made with the consent of the original promoters. When the Bill is introduced to the Lords, it is read a first time, and is then referred to the Examiners, before whom compliance with such Standing Orders as have not been previously inquired into, must be proved. When this has been done (or when the Committee on Standing Orders has seen fit to dispense with compliance), the Bill will be read a second time. This second reading, as in the Commons, affirms the principle of the Bill, subject however to proof of the preamble before the committee, and is immediately followed by the commitment. The proceedings before the Lords' Committee are precisely similar with those adopted in the Commons. The Bill, with the amendments made in committee, is then read a third time, and is ready to receive the Royal Assent.

We have thus endeavoured, in as short a space as might be, to furnish an account of the procedure which has to be followed in obtaining a railway Bill. It will be observed that the same course must be pursued, not only when leave is sought to carry through so important an enterprise as the making of a new railway, but also in every instance when a railway already in operation requires to alter or extend its line, or to obtain additional accommodation for its stations, or in any form seeks authority to do that which it is not entitled to do, by the common law of the realm. The first remark which would naturally occur to one who for the first time heard of all that is thus necessary to be done in order to get the length of the Royal Assent, would be—what a prodigious amount of time, and labour, and money must be expended, from the day when the petition for the Bill is presented, to the day when it shall become a full-fledged Act of Parliament. And such is undeniably the case: there is no *via regia* to a private Act.

It is undoubtedly right and proper that any such interference for behoof of a portion of the community as may involve loss or even serious inconvenience to another portion of it, ought to be made the subject of minute scrutiny, and to be fenced with the greatest care. And one certainly rises from a consideration of our present system of railway Bill legislation, with a thorough conviction that the fence with which it surrounds a *privilegium* is a marvellously thick-set one, and by no means easy to overleap. But when it is borne in mind what incalculable benefit this country as a whole, and almost every part of it, has derived from railway enterprise, the question

may be seriously entertained, whether, after all, the gate has not been made too strait, not only for the promoters, but also for the opponents of Bills; and whether the very end which is sought, and which is supposed to be attained, might not be reached with greater certainty, and with less cost, by a somewhat different method.

In an earlier part of this paper, certain circumstances were mentioned to show the analogy which exists between the procedure which we have been describing, and that in a court of law. The analogy is further supported by the fact, that every party promoting or opposing a private Bill, or petitioning for or opposing any particular provision of it, must pay large fees. But the analogy ceases with the fact of payment, for the amount of fees payable in the conduct of a Bill are out of all proportion larger than those paid to any fee-fund in the kingdom. We rather think, moreover, that it would be found that the high scale of fees which has been adopted is a necessary part of the system. The tribunal is an enormously expensive one to maintain; and, indeed, even when the very large sums which are in use to be paid to those members of the Bar who are in committee practice, are laid out of view, the fact remains, that no individual or corporation can venture on a parliamentary contest either as promoter or opponent of a Bill, unless prepared to spend upon it a sum two or three times as large as would be necessary to vindicate or defend a claim, in a suit of equal magnitude, in a court of law.

But, passing from this complaint against our system as at present administered (which perhaps is rather accidental than essential to it), the tribunal itself seems to us to be open to serious objection. It consists, for the most part, of men of undoubted honesty, and generally of considerable intelligence and shrewdness. But they are not selected on account of any peculiar fitness for the important and difficult work which they have to do. They are not supposed to have made railways their *spécialité*, or to know much more about them than others of their fellow-citizens who use them as a means of transit; while of the districts to be traversed by the proposed line,—of its necessities, of its present supply of carrying power, of its capabilities for development,—of all such matters they are perfectly ignorant. It is true that evidence on these and similar points will be laid before them; but it is pretty certain that that evidence will be in many respects contradictory, and that to come to a sound con-

clusion upon it will not unfrequently be a matter of much delicacy and difficulty. The case would be different if the committee consisted of men who had been trained to the consideration of evidence, to testing the veracity of witnesses, or indeed to the exercise of any of those qualifications which we look for in a judge. But a parliamentary committee has neither the advantage of personal knowledge, nor of experience in coming to conclusions based on the testimony of others. Still further, an immense amount of expense and inconvenience is occasioned by the fact that the investigations preliminary to the passing of railway Bills all take place in London. When a railway is projected in Inverness-shire, or (if such a thing ever comes to pass) in Connemara, the promoters and opponents of the measure must not only bring witnesses all the way to the metropolis, and keep them there; but in the case of skilled witnesses, such as engineers and surveyors, they must have first taken them to the outlying district in which the line is situated, in order that they may make themselves acquainted with its characteristics. We confess that we are unable to find any satisfactory reason for conducting all such investigations in the Palace of Westminster; still less for conducting them in so cumbrous and expensive a fashion. Our courts of law have a well-understood and easily worked machinery for ascertaining facts, and it may perhaps be assumed that our judges are quite as competent to arrive at a conclusion *upon evidence*, as the respectable country gentlemen and peers who compose the parliamentary committees. Or, if it be thought that judges are by nature imbued with too little of the spirit of progress, and are unlikely to keep pace with the enterprising disposition of the community, then let such questions be inquired into, and reported on by a local board or commission, comprising men acquainted with the wants and the capacities of the district, who shall conduct their inquiries in its neighbourhood, and inform themselves by personal investigation, of all matters which it is necessary to bring under the notice of the Legislature. Were such a plan adopted, many of the costly and clumsy provisions of the Standing Orders might be safely dispensed with; and the anomaly with which the country is at present burdened, of a *double* investigation, one in the Commons and another in the Lords, would be abolished. Even under the present system, an alteration in the last-named respect is desiderated by the public. On what principle is it thought necessary that both Peers and Commons should, in

small committees of their respective Houses, be called on to pass an opinion on the details of a railway Bill? That each House should have an opportunity of affirming or denying the *general principle* of a measure, is constitutional and proper; but it is not easy to see why the same evidence should be led in two separate committees. To expose our legislators to a double loss of time is an evil; but uselessly to expose the public, when promoting great commercial enterprises, to a double expenditure of money, is an *intolerable* evil.

It would not be difficult to point out many other failings in the present system of railway legislation. For example, the *inconclusiveness* of a decision come to by a committee when adverse to a Bill, is a source of much hardship to the community. A wealthy company, or combination of companies, may be refused an application for leave to amalgamate, or to increase their rates, or to acquire additional lands, session after session; and yet they may again return to the contest, and fight the same battle, until they either exhaust the patience and the purse of their opponents, or by some lucky accident secure a favourable majority. But it seems to us that a consideration of the complex machinery, with the enormous expense which necessarily attends it, and of the inconsistency and uncertainty of the tribunal to which is entrusted the duty of inquiring into the expediency of railway measures brought before Parliament, is sufficient to warrant the public in pronouncing the system unsatisfactory, and to induce the Legislature either to take advantage of existing modes of judicial inquiry, or to institute some new method which shall have the qualifications of simplicity, moderate cost, and certainty, while it retains all those safeguards against undue interference with private rights, which the present system undeniably possesses.

THE LAW OF HYPOTHEC.

A PARLIAMENTARY Commission to inquire into the law of hypothec has been obtained in the present session, on the motion of the member for Forfarshire. Thus, at length, appears some promise of bringing to an issue a question which has been the subject of a desultory agitation, dating from the great East Lothian case, decided in the House of Lords in 1828. In that case (*Lord Dalhousie v. Dunlop*) the law peers, to their own astonishment, found themselves obliged by the law of Scotland to give effect to the landlord's right

to recover the value of produce of his ground from a *bonâ fide* purchaser who had bought by sample in the public market of Haddington, obtained delivery from the tenant, and paid the price. The attention of the public has recently been again attracted to this subject by the case of *Barns v. Allan and Co.*, arising from a sale of *meal* at Ayr, where a jury found for the purchaser against the right of the landlord, and where the legal question arose, whether the landlord's right of hypothec was affected by the conversion of the grain into meal. That verdict has now been set aside by the Court as against evidence; and although this decision is not of great importance in a legal point of view, since the Court appear to have held on the evidence, that the purchaser was not in *bonâ fide*, or at least was aware that he was buying the produce of the farm for a year in which he had no reason to believe that the rent was paid, yet, the fact that a verdict was given in the face of directions by the presiding judge, is a significant indication that the law of hypothec, as interpreted by our Courts, does not stand high in popular favour. At the present time, therefore, it may be interesting to recal to the minds of our readers, a few points relating to the nature and history of the law of hypothec in this country, and then to consider shortly the points where changes have been demanded, and also whether any legitimate interests require that such changes should be negated or modified.

The *hypotheca* or *pignus* of the Roman law was a real right in a subject in security of a personal obligation. It was indifferent to the nature of this right, whether the subject was in the possession of the debtor or the creditor. It might obtain in the case of either a moveable or an immoveable subject, the Roman law not recognising any general distinction of rights as affecting such different classes of subjects. And it might be constituted either by express convention, or tacitly. One of the tacit hypothecs known in that law was the right of the owner of a rural farm over the fruits in security of his rent, and of the owner of urban property over the *invecta et illata*. How far, in the case of rural subjects, the right extended over *invecta et illata*, appears not entirely free from ambiguity. We are not aware that there was any limitation to the period for which the security extended; but the right was probably attended with little inconvenience, since, from the nature of the *prædium* itself, including probably the right to the service of the *adscriptitii*, and from the modes of cultivation in use, the landlord must usually have been

by far the largest creditor of the tenant. Our lawyers, while repudiating the doctrine of hypothecation of moveables not in possession of the creditor, have retained the hypothec of the landlord over the fruits in rural subjects, and over furniture in urban subjects.

‘Our custom,’ says Stair, ‘hath taken away express hypothecations of all, or part, of the debtor’s goods, without delivery ; and of the tacit legal hypothecations hath only allowed a few, allowing ordinarily parties to be preferred according to the priority of their legal diligence, that commerce may be the more sure, and every one may more easily know his condition with whom he contracts ; and therefore goods sold were not found under any hypothecation for the price. Yet with us there remains the tacit hypothecation of the fruits on the ground in the first place, and, they not satisfying, of the other goods on the ground belonging to the possessor, for the terms of the year’s rent when the crop was on the ground, but not for prior or past years ; and therefore all masters of the ground, or their assignees, having right to the maills and duties, have interest to recover the rents thereof from all intromitters with the fruits, rents, or profits thereof, though upon a title, unless their title, be preferable, or at least have the benefit of a possessory judgment.

But while this branch of our law is thus ostensibly derived from the Roman law of hypothec, and while our lawyers have fostered and nourished it on the principles derived from the Roman *corpus juris*, it owes parentage also to a principle which takes its root in the more homely customs of our own country, and which gave to the ‘masters of the ground’ rights more extensive than any known to the more refined system of the Romans.

There exists by our law a right in the owner of the land over the moveables upon it, which is altogether independent of the Roman doctrine of the fruits being hypothecated for the rents. This is proved, by the existence of a right in a creditor of a *debitum fundi*, to recover his arrears of interest, by the diligence of poinding the ground. The right to poind the goods upon the ground, proceeds upon the principle that such goods are accessories of the land, covered by the real right of the creditor infest. And since this right of the creditor has no analogy in the Roman law whereby its original nature can be obscured, we are enabled in the decisions upon the effect of this diligence to read the history of the ancient rights of landlord and tenant apart from the contemplation of principles imported from a foreign source. We find some points in our

ancient law upon this subject, well summed up in an opinion of Lord Mackenzie, in the case of *Campbell's Trustees v. Paul*, Jan. 13, 1835 (reported in 8 Shaw, p. 242): 'Anciently, the moveables upon land were viewed as accessories of the land, without regard to the rights even of free tenants. They seem to have been considered as the fruits, or the surrogate of the fruits of the land; and as the tenant's right was surely personal, the creditor of the landlord, by brief of distress, could sweep away all the moveables for the landlord's debt. One remedy against the injustice to which tenants were thus exposed was introduced by 1449, c. 18, which made a tack a real right against singular successors; and another remedy was provided by 1469, c. 36, which restricted the liability of the tenant's moveables, in a question with a creditor of the landlord, to the amount of the rents or maills which he was owing his landlord. The latter statute, in particular, points out forcibly the state of the law in regard to moveables on the land, as producing "great heirschip and destruction of the Kingis commons, maillers, and inhabitantes of lordis lands, throw the force of the brief of distress," as the goods and cattle of the tenant were distrained for the debt of the landlord, without reference to the amount of rent due by the tenant. But the remedy of the statute was applicable only to the personal creditors using the brief of distress, and not to real creditors. Where the land was made subject to a real debt, that *debitum fundi* covered not only the land, but also the moveables on the land as accessories. And even when the authority of a court is employed to give effect to this right, it is to give effect to an existing real right, inherent in the infeftment, and, though limited to the moveables on the land which is contained in the infeftment, good against all the moveables (with some qualifications) on that land. At one time the right was good even against the moveables of third parties, though neither owners nor possessors, if brought upon the land. A *debitum fundi* anciently gave a real right over the moveables on the fundus, equal to a right of pledge; and I do not think the decisions can otherwise be accounted for. Nor am I aware of any statute, decision, or even dictum, abolishing this real right. It has been subjected to several limitations, but it has not been abolished. One limitation was, as to the goods of strangers brought upon the farm, established in the case of *Lady Ednam*, July 11, 1628. Another limitation was, the exemption of the goods of tenants from liability, except for their past and

current rents. Again, until the general security of the creditor was made special by pointing, the administration of the moveables on the farm was necessarily left in the hands of the tenant; and as he might fairly alienate to any stranger, it was held that, if such alienation was fully completed before the heritable creditor took any step towards attaching the moveables, the creditor could not afterwards affect them by a pointing of the ground.' We have made this quotation at some length, so as to recal to the minds of our readers the nature of the diligence of pointing the ground, not only because, as we conceive, it throws light upon the history of the right which is called the landlord's hypothec, but because the limitations which have been imposed by statute and usage upon the exercise of the diligence of pointing the ground are extremely suggestive, as we shall afterwards show, of limitations that may reasonably be introduced in the law of hypothec. But, in the meantime, what we may learn from the right of the real creditor above stated is this: that the right of the landlord in the moveables on his farm, was anciently viewed in our law not as a right of *hypothec*, but as a right of *property* in them as accessories to the land, subject to the *personal* right of the tenant. It is clearly impossible that the real right of the landlord's creditor should be one of a higher order than the real right of the landlord himself, although it seems that, at one time, the creditor might employ it so as even to defeat the personal rights of the tenant. The diligence of pointing the ground is, moreover, not competent to proprietors, nor to adjudgers, liferenters, or other real creditors who possess under their different titles, and who may recover the rents by the process of mails and duties; a principle which clearly indicates, that the right made effectual by the process of pointing the ground was originally identical with that of the landlord, which he himself could secure by his own proper and more effectual diligence.

The fiction that the right of the landlord over the crop and stock of the farm is derived from the Roman law of hypothec, has produced its influence more by a confusion of the language of our law, than by a modification of the actual nature of the right. Had the right been truly a right of hypothec, it could scarcely have been pressed to the length of permitting the landlord to follow the goods in the hands of a *bonâ fide* purchaser. On the other hand, following out logically the feudal principle, that the goods on the land are the *property* of the landlord, the whole law of hypothec, as it

is called, follows as a natural consequence. When carried off the land without the authority of the landlord, which is not to be presumed unless the rent is paid, they are subject to a *vitium reale*, analogous to that inherent in stolen property, which can only be purged by their exposition and sale *in corpore* in public market.

But whatever be the early history of the law of hypothec in this country, its effects upon the relations of landlord and tenant, and still more upon the dealings of the latter with a third party, are now too well fixed to admit of any question. We shall here call to mind the leading features of the celebrated East Lothian case, in which these relations were definitively settled by a judgment of the highest court of appeal. The farm of Leggarsdean, in the county of Haddington, belonging to the Earl of Dalhousie, had been let to one Robert Amos, at a rent of L.400, payable in equal parts on the 2d of February and 1st of August yearly. The rent for the crop of the year 1825 was therefore payable on the 2d of February and the 1st of August 1826. Amos died on the 21st of September 1825; and at this time considerable arrears of rent were due. On his death, the management of the farm was assumed by his representatives, who, on the 30th September, went to the public market at Haddington, and agreed to sell to George Dunlop and Co. sixty bolls of barley of crop 1825, at the price of L.94, 10s., payable on delivery. The sale was made with reference to a sample taken from the granary of the farm, where the barley remained, until two days after the sale it was carted away by the servants of the farm, and delivered on the premises of the purchaser, who thereupon paid the price to the tenant's representative. On the 28th of October the landlord applied for and obtained a sequestration of the effects upon the farm. Warrant of sale was issued, under which the effects were sold, and the proceeds applied in payment of the arrears; but there still remained a large balance due to the landlord, who in December raised an action in the Sheriff Court, concluding against Dunlop and Company for L.94, 10s., the value of the grain sold at Haddington. The Sheriff-substitute assolized the defenders from the action, to which judgment the Sheriff adhered; but the Lord Ordinary, 'in respect the barley in question was sold by sample, and was not brought to market and publicly exposed there in bulk, found that the respondents George Dunlop and Company are not entitled in this transaction to the ordinary privileges of purchasers in open market; therefore advocated the cause, and found the said George Dunlop

and Company liable to the advocates in the sum of L.94, 10s., with interest thereon from the 30th of September 1825 as libelled; but found no expenses due to any of the parties.' Both parties having reclaimed, judgment was pronounced by the whole Court, on the assumption that the purchaser acted in *bonâ fide*, and without any collusion with the representatives of the tenant; and on this footing all the judges, with the exception of Lords Alloway and Gillies, concurred in giving effect to the landlord's right of hypothec, and adhering to the judgment of the Lord Ordinary. This judgment was affirmed by the House of Lords, but not without the expression of strong opinions regarding the inexpediency of such a state of the law, and the undue restrictions which it imposed upon the freedom of commercial transactions,—opinions which we find expressed in terms of that antiquated courtesy to the Court below which was then in use: 'If the case had been,' said the Lord Chancellor, 'what we call doubtful, and if it had been a measuring cast between the two grounds of decision, one should have leant very strongly against a doctrine so greatly tending to fetter commerce, as one setting aside a sale by sample in a public market; but however inexpedient such a law may be, and however much that inexpediency is to be complained of by his Majesty's subjects in Scotland, not only by the dealers in corn, but by all the consumers of corn,—however it may call upon your Lordships to apply in your legislative capacity a remedy for this, yet in your judicial capacity you have no course left but to affirm the almost unanimous decision of the Court below. All the judges were consulted; some of the ablest Scotch lawyers have appended their names to this opinion; and there is but one dissentient voice among the whole. It is not for judges to decide whether the law shall be put in force or not. Judges have but to administer the law. The judges in Scotland have administered the law as they found it. Your Lordships are mere judges by appeal on their judgment, and therefore are acting as Scotch law judges; and in that capacity, I humbly submit, your only course is to affirm the decision.'

Notwithstanding, however, this strong expression of opinion from a Court, itself possessing a share of the supreme legislation, the hypothec of the landlord remains in all its pristine authority; and, if we may judge from the case of last session above referred to, we may assume that the judges of our Supreme Court are prepared to

carry the doctrine to its logical consequences. Such an attitude on the part of the Court in regard to an inconvenient law, would be, in the general case, the most certain means of ensuring a legislative remedy; but the law of hypothec enjoys an exceptional vitality, which has hitherto defied any such change. By an express proviso it escaped scatheless under the reforms of the Personal Diligence Act, 1 and 2 Vict., c. 79. By a similar saving clause it is carefully preserved from all risk of danger through the changes of the Mercantile Law Amendment Act, 19 and 20 Vict., c. 60, sec. 4; and by the like magic talisman it stands unimpaired amid the leveling provisions of the Bankrupt Act, 19 and 20 Vict., c. 79 (sec. 119), which scruples not, however, to prescribe reasonable limits to the preference created by the diligences of heritable creditors (see sec. 118). The reason of this is, that an idea has been afloat, that a change in the law of hypothec would injuriously affect the landed interest,—an interest which, it is superfluous to remark, is all-powerful in this country.

The only practical question, therefore, with regard to legislation on the matter, is, Whether a change can be made in the interest of commerce, without prejudicially affecting the landed interest? or rather the question for the Legislature will become this, Whether the landlords as a body have any legitimate interest to oppose such changes in the law as would be expedient and necessary for the due freedom of commercial transactions? Now, what is the legitimate interest of landlords in this question? Simply this, that a landlord of ordinary vigilance and prudence shall be secure from loss in the event of his tenant's insolvency or bankruptcy. It is not the legitimate interest of a landlord that he should be able, without risk of loss, to allow his tenant to get into arrear of his rent. Neither is it the legitimate interest of a landlord that he should be able, without risking actual loss of rent, to let his farm to a tenant in indifferent circumstances. The question remains, Is it a legitimate interest of the landlords as a body, that they should have the power of following the produce of a farm in the hands of a *bonâ fide* purchaser? We venture to think it is not so; and that a landlord, reasonably vigilant and reasonably well informed of the circumstances of his tenant, would be well enough secured even though his recourse were cut off against the *bonâ fide* intromitter. We do not think it is possible for a landlord in England, exercising reasonable caution, to suffer material loss by the bankruptcy of his tenant,

although he requires to distrain in order to secure himself, and although, in the event of the tenant's bankruptcy, his distress gives a preference only for a year's rent. An English landlord certainly will exercise great circumspection in regard to his tenant's character as a substantial person; and this practice tends very much to promote the general improvement of the land, as well as to uphold a general average of wealth in the class of occupiers.

If the landowners in Scotland are alive to their true interests, we do not think they will be averse to any change which will place on a better footing commercial dealings in the produce of the land, although it should compel them to exercise more circumspection in their choice of tenants, and more vigilance in observing their circumstances and their transactions. This observation, of course, only applies, providing the contemplated change preserves what we have already called the legitimate interest of the landlord; and in order to consider how such a change might be effected, so as to alter as little as possible the existing law, let us revert for a moment to the position of the heritable creditor, and the security which he possesses for the payment of his interest. That security may be made effectual in one of two ways—by an action of poinding the ground, or by the action of maills and duties. The right of an heritable creditor, without a title to possession such as that given by an assignation to the rents, was, as we have seen, early so restricted, that until made special by poinding, he could not prevent a voluntary alienation by the tenant of the goods upon the land, or recover goods which have been carried off by personal diligence, completed without his coming forward to interfere. The creditor, however, who has taken an assignation of the rents, is entitled, after taking his decree of maills and duties, to the privileges of the landlord's hypothec; and accordingly, it has become the universal practice in heritable bonds, for the creditor to take such an assignation. In both classes of heritable securities, however, the important modification is introduced by the Bankrupt Act, 19 and 20 Vict., c. 79, sec. 118, which, in case of the respective diligences not being carried through at least sixty days before the date of bankruptcy, restricts the preference created by them to the interest of the debt for the current half-yearly term, and the arrears of interest for one year immediately before the commencement of that term. Now it does not appear to us that either class of heritable creditors have any cause to complain of the insufficiency of the security for the pay-

ment of their interest; and it is difficult to see that the restrictions which both the courts of law and the Legislature have seen fit to place upon the rights of the heritable creditor infest, should not be extended to the right of the landlord himself. It would be for the interest of commerce if the right of hypothec before sequestration of the crop and stock, were assimilated to the right of the heritable creditor (who has no assignation of the rents) before poiding the ground,—a right, namely, which cannot affect any alienation by the tenants fully completed before the general right is made special by the step of diligence. It would be for the interest of commerce if some provisions were introduced to ensure the publicity of the diligence of sequestration, and that intromitters establishing their *bona fides* should be protected. And it would be for the interest of commerce, if, in the case of bankruptcy ensuing within a certain date, the preference of the landlord were restricted to the rent of the current year, and of such further terms as the Legislature may think necessary. We do not think some provisions of the kind indicated would be found prejudicial to the general interest of landlords. In the meantime, we are glad to see that there is a prospect of the question being submitted to the only method of inquiry which can satisfactorily elicit all the views, opinions, and facts which can be brought to bear upon the subject by those either actually interested, or who have peculiar means of information within their reach.

R. C.

CASE LAW OF THE SESSION.

AT the close of the sessional year we resume our comments upon the current law. The cases referred to in this article include all those decided in the course of the summer session which appear to possess any general interest; and in grouping them, we follow substantially the same order of arrangement as that of former articles.

I. FAMILY RELATIONS.—The present session has been unusually barren of cases falling within this category. The only one we shall notice is that of *Lord Macdonald's Curatory*, 11th July, where the Court, for the first time, sanctioned the appointment of a curator domiciled and resident in England. As the curator was taken bound by his bond of caution to appear before the Court of Session to answer for his conduct as curator when required, he agreeing to

prorogate the jurisdiction of the Court for that purpose, and binding himself to obey the orders of the Court in reference to the curatory, it would seem that the Court had in view the necessity of taking precautions to avoid such a conflict of jurisdiction as occurred in the Marquis of Bute's case. It is certainly not desirable, considering the intimate union of England and Scotland, that the choice of guardians should be confined within any narrower area than the United Kingdom; and it is to be hoped that the liberal spirit evinced by the judges of our Superior Courts in matters affecting their equitable jurisdiction, may be reciprocated by the Court of Chancery.

II. CONTRACT.—(1.) *Sale*.—The case of *Smith v. Johnston*, June 21, shows that exceptions may be admitted to the general rule that an offer in writing must be accepted in the same manner. In this case the pursuer had purchased certain growing crops by private bargain from the agent of the defender authorized to act in that behalf. The purchaser, at the request of the vendor's agent, made his offer in writing, and a written acceptance was promised by next morning; but the defender subsequently refused delivery, alleging that the contract was incomplete, and that he was entitled to resale. The Court, notwithstanding, gave decree for specific implement, upon the ground that the transaction was truly completed by the verbal agreement, writing being only required for the purpose of preserving evidence of its terms. A more difficult question would have been presented if the purchaser had declined to take delivery, in consequence of the vendor failing to transmit his written acceptance within the time agreed on. Such a failure may reasonably be regarded as a departure from the terms of the contract on the part of the vendor, giving the purchaser the option of either declaring the sale at an end, or suing for implement, as was done in the present instance.

(2.) *Master and Servant*.—In the case of *Duncan v. Morrison*, June 24, an attempt was made, but without success, to introduce the principle that the stipulated period within which notice should be given for the termination of the contract of hiring, fixes the duration of the contract. The pursuer was engaged as matron and housekeeper of a boarding establishment at a salary of L.30 a year; and apart from special stipulations, the contract would, on the analogy of previous decisions, have fallen to be dealt with as an

engagement from year to year. But it was agreed that the arrangement might be terminated by either party at the end of the current year, by giving three months' notice; and this was maintained by the hirer to import a continuing contract terminable at any time after the expiration of the first year upon three months' premonition. It was considered, however, that such an indefinite contract not being recognised by the common law, could not be inferred in the absence of an express agreement to that effect. The contract was held to be renewed from year to year, with the obligation of giving three months' notice, as in the ordinary case of half-yearly hiring, with a month's notice before the term. We suspect that Mr Dunlop's Bill of the present session, if passed into law, would not have reached the present case,—a consideration which suggests doubts as to the expediency of making partial changes in a department of the law which is founded upon custom, and which could not be altered without providing by anticipation for many exceptional cases.

(3.) *Agency*.—In several cases of recent occurrence, the Court have been called upon to apply the principle of *quantum meruit* to the recompense of services for which no fixed remuneration had been stipulated. The cases of *Addie v. Pinkerton*, June 22, and *Barr v. Edinburgh and Glasgow Railway Company*, June 17, illustrate the principle, without exhibiting any special circumstances deserving of more particular notice.

The case of *Ranken v. Galloway*, June 11, introduces what will generally be considered an extension of the doctrine of recompense to the contract of professional agency, the remuneration for which has hitherto been supposed to be regulated by usage, or by what is equivalent to usage,—the understanding that such contracts are made on the footing that the agent is to be remunerated according to the tables of fees approved by the profession. The question was raised by a petition in the Sheriff Court of Lanarkshire (afterwards advocated) for delivery of a writ of confirmation written upon a disposition which the respondent, the superior's agent, refused to deliver upon payment of L.6, 9s. 6d., the charge allowed by the table of fees of the Faculty of Procurators in Glasgow, alleging that he was not bound by that table, and that he was entitled to a fee of L.9, 12s. The specialty in the case was, that Mr Ranken, being agent for the Blythswood property, upon which a large part of the west end of Glasgow is built, had an adverse interest to that

of the general body of the profession in the matter. The Sheriff-substitute (Bell), to whose judgment the Sheriff adhered, held that the respondent was bound by the table of fees approved by the society of which he was a member; but the Second Division recalled the judgment,—found that he was not bound by the table, and that there was no ground for holding that there was any implied contract between the parties that the respondent should be remunerated according to said table of fees; and, after remitting to a professional gentleman in Edinburgh, found that the sum of L.9, 8s. 6d., suggested in his report, was a fair and reasonable remuneration for the services performed.

It must be admitted that the understanding upon which professional tables of fees have been supposed to be binding, does not rest upon any authoritative rule of law; but in the absence of express authority, the practice which has so long prevailed does seem to us to be entitled to greater weight than the Court has accorded to it. Our object, however, in noticing the case is not to find fault with the law as laid down by the judges; but to point out the inconvenience which must result from the sanction which has been given to this attempt to break through the customary rule applicable to the taxation of agents' accounts. In point of fact, clients do contract upon the understanding that their agents, and the agents of the parties contracted with, are to be paid according to the professional tables of fees; for, although the client does not know what is the fee applicable to a particular piece of business, he knows that there is a fixed fee, and that it has been so fixed by the profession—who, as a body, are acquainted with the nature of the business, and the amount of labour and responsibility connected with it. As it is impossible for clients to make special agreements with their agents for each transaction, it is but fair that they should have the protection of a fixed table of fees, according to which their agents' accounts may be taxed, without the necessity of resorting to the Court to determine the rate of remuneration. If the profession are no longer to have the power of prescribing a table of fees for their own remuneration, that power must be vested somewhere; and we would suggest that application should be made to the Court to revise the tables now in use, and, if competent, to sanction them by Act of Sederunt.

(4.) *Bill of Exchange*.—The rule, that delivery of a bill stamp signed in blank entitles the holder to fill in the requisite obligation,

was applied in the case of *Bain and Purdie v. Brown*, June 3,—an action upon a promissory note written upon a bill stamp, which the principal defender had sent to a bank agent as a security for cash advances. The stamp was filled up with a promissory note in the usual form, and sent to and endorsed by another party whom the defender had nominated as his cautioner in the transaction. In renewing the note, the relative situations of the maker and indorser were transposed. Among other defences, it was pleaded that the note had not been made out in the terms authorized by the maker; but this defence, as well as one to the effect that the defender, as *indorser* of the second note, was entitled to notice of dishonour, was overruled. This case is therefore an authority for the proposition (which has already received some support from English decisions), that the indorser of a bill granted for his own accommodation is not entitled to notice of dishonour.

In *Haldane v. Minto*, May 31, suspension of a warrant of imprisonment upon a bill of exchange was brought, upon the ground that the suspender had tendered payment of the balance under deduction of two illiquid claims, consisting of sums due to the suspender for the price of turnips and cattle, and also of a sum due to him under a decree. It appeared that the suspender was also liable to the charger in other obligations. The Court were of opinion that if the delivery of cattle and turnips, of the value alleged, could be held to be payments at all, they were indefinite payments, which the incarcerating creditor was entitled to impute to his least secured debt; and the suspension was accordingly refused.

III. INJURY.—The Court of Session is certainly not liable to the reproach which is sometimes laid to the charge of the courts at Westminster, of encouraging petty actions of damages. The practice of testing the relevancy of the action by a discussion on issues, while it may occasionally lead to the turning a client out of court whose only fault is that he does not know how to state his case, has the advantage of extinguishing many groundless claims which will not bear the test of inquiry into the legal grounds of action. This is illustrated by two recently reported cases on issues of reparation,—one being an action for slander said to have been uttered ‘on or about the 7th, 10th, 11th, 12th, 13th, 14th, 25th, 26th, 27th, and 28th days of April 1860, or on one or more of said days, within the village of Newhaven,’ to fishermen and other persons named and

designed in the proposed issue, *Bisset v. Ecclesfield*, May 21. The Second Division of the Court, judging that the specification of ten days was intended not to apply to ten different slanders, but to give a latitude in point of time beyond what the pursuer could in fairness require, disallowed the issue, and dismissed the action with expenses. This case suggests the inquiry, whether some restriction should not be put upon the right to sue for damages for mere abuse. The English courts allow actions for defamatory expressions in writing to the same extent as our own courts; but by a rule of practice which has the force of law, they refuse to entertain actions for spoken slander, except where the slander amounts to a deliberate imputation of crime, or where special damage can be proved. In Scotland there is practically no restriction; yet every one must be sensible of the absurdity involved in a trial for abusive expressions used by a fisherman or a carter to a companion who is daily in the habit of garnishing his speech with expletives similar to those of which he complains. In the present case, the slander consisted in calling the pursuer 'a thief, and a damned blackguard.' An English Chief Justice is said to have ruled, that though 'thief' was an actionable expression, it was not actionable to call the pursuer a 'damned thief,'—the combination of the two offensive elements being, in his opinion, as little injurious as the insipid salt formed by the addition of an alkaloid to a corrosive acid. Without committing ourselves to an approval of this ingenious construction, we may say that it would be better for the parties, as well as for the dignity of the law, that the right of reparation for verbal injury should be confined to cases in which actual damage has accrued. Abusive expressions may lower the character of the utterer, but can seldom be the cause of injury to the person against whom they are directed; and where there is no injury, it is not necessary that the law should provide a remedy.

The other case to which we have referred, *Turnbull v. Hobkirk*. (June 18), was an action for *solatium* and reparation for the death of the pursuer's sister, by whom he was partially supported. The allegation was, that the deceased had caught her death of cold in consequence of her house being exposed to the weather, whilst the landlord was in course of executing certain repairs upon it. This claim reminds us of one equally ingenious, which occurred a few years back, where a trustee claimed damages from his co-trustees

for heart-disease, brought on or aggravated by their perverse opposition to his wishes in the management of the trust. It need hardly be said, that in both cases the cause of damage was held to be too remote to afford a ground of action.

The strict construction of records in actions of damages has received its latest illustration in the case of *Macintosh v. Smith and Lowe* (June 22), where the Lord President laid down, and the Court, on a bill of exceptions, affirmed the ruling, that under a summons charging the defenders with wrongfully detaining the pursuer in a lunatic asylum, he not being insane, the jury were not entitled to take into consideration evidence tending to establish a breach of the statutory regulations applicable to lunatic asylums, of which notice had not been given in the record. We understand that the judgment upon the bill of exceptions has been appealed.

IV. PROPERTY.—(1.) *River, Minerals, etc.*—In *Morris v. Bicket* (May 20), the Court applied the rule of law, that it is not allowable for conterminous heritors *aliquid erigere in alveo fluminis*, to a case in which the encroachment was so slight as to give rise to the plea, that it could exert no appreciable influence upon the course of the stream, or upon the complainer's interest in the *solum*. The Court disregarded this view of the matter, being of opinion that although damage might not actually be occasioned by the erection of a wall projecting a few inches into the stream, yet as the encroachment involved a certain risk of damage, and as the smallest interference with the course of running water may be productive of the most serious results, actual damage or reasonable probability of damage was not a necessary part of the case of a suspender complaining of such encroachments. The converse of this strict interpretation of proprietary rights is shown in the case of *Macintosh v. Macintosh* (July 15), where it was ruled, that as the operation of muir-burning was a lawful act, the proprietor of the lands where the burning took place was not responsible for the consequences of the extension of the fire to adjoining lands, unless upon proof of actual negligence.

The case of *Findlay v. Maxwell* (July 13) will probably be referred to for the observations of the judges relative to the implied power which a mineral-proprietor possesses of making a reasonable use of the surface, for the purpose of working the mineral-field. The question in this case was, Whether a pit which had been sunk in one portion of what was originally an entire estate, could be used

or the excavation of coal underlying an adjoining subject, which had passed by purchase into the hands of a different proprietor. The failure of the pursuer to connect his title with that of the superficial estate by deeds anterior to the subdivision of the property, was fatal to his ground of action ; and the general question, as we have stated it, did not form the subject of decision. Lord Deas, however, expressed himself as favourable to the view that the right of the underground proprietor to work out the minerals by a connected series of workings, should not be prejudiced by the circumstance of the surface being divided amongst different proprietors after the separation of the two estates. The decisions on the question are conflicting, which is not surprising, when we consider the difficulty of reconciling the existence of two distinct rights of property in the same area with the principles on which our property-law is based.

(2.) *Right of Way*.—The decision of the new Elgin right of way case (*Jenkins v. Grigor*, June 9), although satisfactory as regards the individual interests involved in that action, may, unless the principle is modified by equitable considerations (as it probably will be), tend materially to compromise the interests of the public. What the Court actually found was, that the question of the existence of a right of way having been fairly tried in an action at the instance of certain persons who were allowed to represent the inhabitants of the district, another action at the instance of different individual pursuers was not maintainable. The opposite rule, it was thought, might lead to oppression, by saddling the defender with a succession of ruinous actions ; and it is scarcely an answer to this argument, that the defender may recover his expenses, because it is well known that the extrajudicial expenses alone of three or four trials of a case of this description would amount to a small fortune. Besides, there is no guarantee that the defender shall recover his expenses from No. one, as a condition precedent to his being required to enter the lists with Nos. 2, 3, and 4 ; nor can a defender in such a case hope to escape an adverse verdict in every trial, even if his defence be well founded. Upon these grounds, we hold that an action of right of way is truly *actio popularis*, and ought to be treated as such. The principle of *res judicata*, in its usual and strict sense, fails when applied to this description of actions ; and it would be mere pedantry to maintain an application of that principle which would give the defender no security for peaceable possession until he had litigated with every one of her Majesty's subjects. On the whole, we think the Court

must just consider whether there has or has not been a fair trial of the particular right, in the interest of the public, and decide accordingly.

V. ENTAIL.—Two questions of considerable interest, depending upon the construction of the Entail Amendment Act, were decided by the First Division on the 10th and 11th June. In the case of *Robertson* (Strowan Entail), an interlocutor of the junior Lord Ordinary was affirmed, by which his Lordship found that an application for authority to disentail could not be prosecuted by the heir and representatives of the petitioner after his death. The death of the one heir, and the opening of the succession to another, gave rise to new rights in the person of the next heir-substitute. If the heir be a minor, as he was in this case, the disentail in an application insisted in at his instance would be a direct contravention of the provision of the Act, which requires that the heir executing the disentail should be twenty-five years of age. In the case of *Buchanan* (Drumpeller and Burnhead Entail), the Court, on the report of the Lord Ordinary, ruled that lands received in excambion, after the date of the Act, might be disentailed under the 3d section, as being in effect parts of a larger entailed estate held under an entail executed before 1st August 1848. A similar conclusion was arrived at with respect to lands bought with compensation money, though the Court, owing to the peculiar wording of the Lands Clauses Act, had more difficulty in assuming that these were to be regarded as a *surrogatum* for the land taken under compulsory powers.

In *Howden v. Glassford* (July 7), it was determined by the First Division, after consultation with the other judges, that a prohibitory clause in which the word 'dispose' had been converted by erasure and superinduction into 'dispone,' was neither ineffectual from insufficiency in the language originally used, nor null in respect of erasure in *substantialibus*. Their Lordships appear to have been anxious to guard against the decision being drawn into a precedent for disputing the peculiar efficacy of the mystical word 'dispone' in deeds of conveyance. In their opinions, it is sufficient that a deed of entail prohibits disposition by words comprehensive enough to include, though not necessarily restricted in their meaning to the formal act of conveyance. 'Alienate' had already been held to be good enough for the purposes of a prohibitory clause. 'Annalzie' is one of the words employed in the Entail Statute; and as it is not now considered necessary that deeds of entail should be written

in the idiom of the seventeenth century, 'dispose' may well be received as a word of equivalent import.

VI. TRUSTS AND SUCCESSION.—Upon the subject of proof of trust we have, in addition to a case raising the issue of trust or donation (*Kirkpatrick v. Bell's Executors*, July 8), another decision upon the construction of the Act 1696, as applied to the proof of a constructive trust. An action was raised by a party who was joint tenant along with his father under a written lease, to have it declared that the lease was truly intended for his, the son's, exclusive benefit. It being considered that the case did not fall within any of the recognised exceptions to the rule of the statute, the Court held that the ground of action was an averment of trust, and accordingly limited the proof to writ or oath.

It is fortunate for beneficiaries that the greater number of the difficulties arising upon the construction of trust deeds escape detection by their advisers; for, if we may judge by the number of cases in which trustees are found to follow suit as soon as a new question is started, the number of undetermined questions must be well-nigh incalculable. At present the fashionable question is the meaning of the words 'executors and assignees,' or 'heirs and successors,' occurring at the end of a destination. Somebody lately suggested a doubt whether such words occurring in a settlement executed before the date of the Moveable Succession Act, could be held to include heirs taking by representation under that Act; and now there are probably twenty actions in Court to determine the meaning of those words in clauses which were not previously supposed to present any peculiar difficulties of construction. Two of these have been decided this summer (*Nimmo v. Murray's Trs.*, June 3, and *Cockburn's Trs. v. Cockburn*, June 10). In the former case it was ruled that 'heirs and successors' included persons entitled to take by representation under the Moveable Succession Act. No doubt can be entertained of the soundness of this decision. A more difficult question was raised in a case decided by Lord Ormisdale last winter, but not brought under review of the Court, where the words used were 'executors and assigns;' and it was maintained that the word 'executors' must be confined to executors-at-law, i.e., those entitled to the office of executor, which office representatives under the Moveable Succession Act are not entitled to assume in competition with the next of kin.

VII. PAROCHIAL LAW.—The reports of this session contain a variety of decisions connected with the liabilities of proprietors in connection with churches, glebes, and schools, and the support of the poor; but none of them possess any general interest excepting perhaps the case of the *Inspector of North Leith v. The Commissioners for the Leith Harbour and Docks* (June 17). In this case their Lordships of the First Division (affirming the judgment of Lord Jerviswoode) held, that the right of port and harbour, and of levying dues vested in the commissioners, was a subject liable to assessment for the relief of the poor. But as this decision is merely a repetition of the judgment in *Adamson v. The Clyde Trustees*, it is unnecessary that we should particularize the grounds of it.

VIII. ACTIONS AND DILIGENCE.—The Accountant in Bankruptcy has raised the question, Whether the prohibition of the 83d section of the Bankruptcy Act against the trustee retaining in his hands more than L.50 of the trust money, applies to dividends already declared and held by the trustee for the purpose of distribution. The Court very properly held that the section was applicable; the reason of the prohibition being as strong in the particular as in the general case. Their Lordships were, however, of opinion, that the question was properly brought before the Court for decision, and that the trustee was entitled to have it judicially determined (*Froyd's Segn.*, June 29).

An important decision connected with the law of diligence (*Barns v. Allan*, June 1) has suggested the topic of another article in this number of the *Journal*, to which we beg to refer our readers.

VACATION ARRANGEMENTS.

CIRCUIT APPOINTMENTS.

NORTH.—Lords Justice-Clerk and Neaves. J. A. Crichton, Esq., *Advocate-Depute*. Aeneas Macbean, *Clerk*.

Inverness—Thursday, 15th September. *Aberdeen*—Tuesday, 20th September. *Perth*—Tuesday, 27th September.

SOUTH.—Lords Cowan and Deas. Alexander Moncrieff, Esq., *Advocate-Depute*. Robert L. Stuart, *Clerk*.

Dumfries—Friday, 9th September. *Ayr*—Wednesday, 14th September. *Jedburgh*—Tuesday, 20th September.

WEST.—Lords Ardmillan and Jerviswoode. G. H. Thoma, Esq., *Advocate-Depute*. W. Hamilton Bell, *Clerk*.

Stirling—Thursday, 8th September. *Inverary*—Wednesday, 14th September. *Glasgow*—Monday, 19th September, at 12 noon.

BILL-CHAMBER ROTATION OF JUDGES.

Autumn Vacation, 1864.

Thursday, 21st July, to Saturday, 23d July 1864, .	Lord KINLOCH.
Monday, 25th July, to Saturday, 6th August, .	Lord ORMDALE.
Monday, 8th August, to Saturday, 20th August, .	Lord BARCAPLE.
Monday, 22d August, to Saturday, 3d September, .	Lord CURRIEHILL.
Monday, 5th September, to Saturday, 17th September, .	Lord BENHOLME.
Monday, 19th September, to Saturday, 1st October, .	Lord KINLOCH.
Monday, 3d October, to Saturday, 15th October, .	Lord ORMDALE.
Monday, 17th October, to Saturday, 29th October, .	Lord BARCAPLE.
Monday, 31st October, to meeting of Court, .	Lord CURRIEHILL.

BOX-DAYS.

Thursday, 1st September ; and Thursday, 13th October.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

TURNBULL *v.* HOBKIRK.—*June 18.*

Reparation—Issues.

This was an action at the instance of a lame and infirm man in Howgate, Hawick, against his landlord for reparation and *solatium* for the death of his sister, by whom he was partially supported and attended to, and who lived in the same house with him. The alleged grounds of action were that repairs were begun on their houses without notice to the tenants in December 1862, and that in consequence of these repairs the sister was so exposed to the weather that she caught cold and died, and that the pursuer himself was deprived of all access to his house, which was on the highest floor, except by boards laid in a slanting direction.

The Lord Ordinary dismissed the action so far as regarded the conclusion for *solatium*, and the case was now reported to the Court on the following proposed issues:—

1. Whether, in or about the month of December 1862, the pursuer's sister, Euphemia Turnbull, was tenant of a house immediately under the roof in said tenement, and the pursuer occupied a part of said house; and whether, in consequence of the wrongous and unwarrantable acts of the defender, the pursuer's said sister was seized with cold and influenza, which caused her death, to the loss, injury, and damage of the pursuer?

2. Whether, . . . while the pursuer occupied, as aforesaid, the said house, etc., the pursuer was exposed to the inclemency of the weather, and prevented from getting access to his said dwelling-house, to his loss, etc.?

Damages laid at L.300.

The Court held that the record was not sufficiently specific either in regard to the degree in which the pursuer was dependent on his sister, or

in respect of the inconvenience suffered by him from want of access to the house. From all that appeared, the inconvenience might have been of the slightest description. He might merely have been kept out of his house for a single night, and been obliged to sleep with a friend. The action, moreover, was laid both for *solatium* and patrimonial loss. The former was now out of the case; but on the issue as laid it included both, and it would be very inconvenient and improper to be obliged to lay before a jury both the original record and the circumstances which had changed it into another record.

The action was therefore dismissed with expenses.

M'INTOSH v. SMITH AND LOWE.—June 22.

Damages for Wrongful Detention — Exceptions.

In the month of February last an action of damages was tried before Lord Kinloch and a jury, at the instance of Angus M'Intosh, Esq., of Holme and Drummond, against Drs Smith and Lowe, the proprietors or keepers of Saughton Hall Asylum. The alleged ground of action was the forcible and wrongful detention of the pursuer in the said asylum by the defenders, he being sane, and they knowing him to be so; and the issue adjusted to try the case was generally whether the defenders wrongfully and illegally detained the pursuer, to his loss, injury, and damage. After a trial which occupied seven days, the jury, having been locked up for more than three hours, returned a verdict for the defenders by a majority of nine to three. The pursuer having taken exception at the trial to the ruling of the presiding judge on certain points, these were brought before the Court by bill of exceptions. The first and fourth exceptions had reference to the judge's refusal to admit certain evidence. In 1861 Mr M'Intosh brought an action of declarator of sanity against his mother, Drs Smith and Lowe, and some others. There were no petitory conclusions in the summons, and no appearance was made for the defenders; and Mr M'Intosh, after leading an *ex parte* proof, obtained decree in absence, declaring him to have been *compos mentis* during the period when he was confined at Saughton Hall. At the trial an extract of this decree was tendered in evidence for the pursuer to maintain his case, but Lord Kinloch refused to admit it, and the pursuer took exception. The second and third exceptions had reference to the admissibility of certain evidence which the judge had allowed to be received. The pursuer having stated in evidence that he went down to Richmond once in the spring of 1852, and that something particular then occurred, the defenders' counsel proposed to ask the witness about the particulars referred to, when the counsel for the pursuer objected that the defenders were not entitled to ask the witness questions concerning specific instances of previous conduct on his part of which no notice was given on the record. Lord Kinloch repelled the objection, and admitted the evidence; and the pursuer took exception to this ruling. The fifth and only other exception insisted in referred to a direction of the judge to the jury. The pursuer having pleaded that he was entitled to a verdict in respect of his having been improperly confined in the strong room of the asylum, and in respect of certain irregularities on the part of the defenders in keeping the statutory registers of patients, Lord Kinloch directed the jury that the issue sent for trial by the Court did not raise the question, Whether, supposing the

pursuer rightly detained in an asylum, there was any illegality in the mode of his confinement, and did not raise any question of breach of statute, or of regulations made under authority of statute, in regard to the registers of the asylum or the manner of keeping them?

To-day the Court unanimously affirmed the ruling of the judge presiding at the trial on all these points, and refused the bill of exceptions.

DUNCAN v. MORRISON.—June 24.

Master and Servant—Term of Employment.

In the end of April 1857, the pursuer, who is the widow of the late Andrew Duncan, writer in Lerwick, was engaged by the defender as matron and housekeeper of a boarding establishment kept by him at Glasgow, at a salary of L.30 a year, with board and lodging. The pursuer was engaged for a year, but it was agreed that the engagement might be terminated by either party at the end of the current year by giving three months' notice. The defender's establishment consisted, besides himself and the pursuer, of about eight boys as boarders, two tutors, and two female servants; and the situation of matron and housekeeper is described as one of trust and responsibility. The pursuer entered on the defender's employment at 15th May 1857. At the end of the first year she continued in the discharge of her duties, by tacit relocation, for a second year, and she had entered on a third year, when on or about the 31st July 1859 she was dismissed by the defender, on the ground of her having neglected her duties. During the two years from Whitsunday 1857 to Whitsunday 1859 she received her salary half-yearly, at Whitsunday and Martinmas. In these circumstances the pursuer brought the present action in the Sheriff Court of Glasgow, in which she sues the defender for L.25, as the balance (L.5 had been paid to account) of the year's salary current at her dismissal, and for L.21, 10s. of board wages for the unexpired period of that year, on the ground that she was dismissed from the defender's employment without just or sufficient cause. In defence, the defender denied that the pursuer was engaged for a year, and averred that the engagement was not for any definite period, but that it was terminable at any time on three months' notice, and he offered the pursuer wages and board wages till the first term of Martinmas after dismissal. The defender also pleaded that he was justified in dismissing the pursuer, 'in consequence of her mismanagement, misconduct, and incompetency in regard to her duties.'

The Sheriff-substitute (Strathern) found the pursuer entitled to the wages and board wages sued for. The Sheriff (Sir A. Alison) reversed this interlocutor, holding that the wages and board wages offered by the defender were all for which he was liable. The pursuer having advocated, the Lord Ordinary (Mackenzie) recalled the Sheriff's judgment, and affirmed that of the Sheriff-substitute.

The averment that there were sufficient grounds to justify the pursuer's dismissal having been virtually abandoned at the debate, the only question came to be, whether the pursuer was hired by the year as alleged by her, or whether the hiring was for no definite period, and terminable at any time on three months' notice by either party, as maintained by the defender.

The Lord Ordinary, in the note to his interlocutor, stated that, after

carefully considering the proof, he concurred with the Sheriff-substitute in thinking that it was a case of yearly hiring, although it was agreed that the engagement might be terminated at the end of the current year by either party giving three months' notice to the other.

To-day the Court adhered to the Lord Ordinary's judgment, holding that the contract of employment averred by the defender was of an unusual character, and therefore the *onus* of proving it *distinctly* was on the party averring it, and that this *onus* had not been discharged by the defender.

REPORT BY ACCOUNTANT IN BANKRUPTCY IN FREYD'S SEQUESTRATION.—
June 29.

Bankrupt Act—Liability of Trustee.

The 83d section of the Bankruptcy (Scotland) Act, 1856, enacts that—'If the trustee shall keep in his hands any sum exceeding L.50 belonging to the estate for more than ten days, he shall pay interest to the creditors at the rate of L.20 per centum per annum on the excess of such sum above L.50 for such time as the same shall be in his hands beyond ten days.' The trustee on this estate having been appointed by the commissioners to divide the sum of L.643 as a first dividend among the creditors who had lodged their claims in terms of the statute, intimated to all the creditors by circular that the dividend which had been declared would be payable at his office in Glasgow on the 8th day of October 1863. Between the 8th and 15th of October, creditors to the extent of L.423, 13s. 11d. applied for and obtained their dividends. The creditors entitled to the remaining L.219, 6s. 1d. did not apply for their dividends until the 30th October, and during this period the trustee retained this sum of L.219, 6s. 1d. in his hands. As this appeared from his accounts when they were lodged with the Accountant in Bankruptcy, in terms of the statute, he called on the trustee for an explanation of the apparent contravention of the provisions of the statute. The trustee, in answer to this call, maintained that, on a dividend becoming payable, the trustee is entitled to draw the amount of the dividend from the bank account, and that he then holds the money for the creditors respectively, and that it then ceases to be money belonging to the bankrupt estate, as it is payable at call by the trustee to the creditors. The question thus raised was brought before the Court by a report from the Accountant in Bankruptcy, with answers thereto for the trustee. After hearing counsel to-day, the Court unanimously held that, as it was the whole scope and policy of the Bankrupt Act to guard against a trustee's retaining in his hands, for more than ten days, upwards of L.50 belonging to the bankrupt estate, and the terms of the statute were sufficient to give effect to this intent, there had been a contravention of the statute in the present case, rendering the trustee liable for the additional interest. The amount not claimed by the creditors on the date at which it was intimated the dividends would be paid, should, they were of opinion, have been re-deposited by the trustee in the general sequestration account. Their Lordships stated that the question had been very properly brought before the Court for decision, and it was satisfactory that it occurred in a case where the amount was so small, and the position of the parties was such as to make the question an abstract and not a personal one.

The Accountant in Bankruptcy did not ask for expenses.

*Dec., THE ELGIN AND LOSSIEMOUTH HARBOUR COMPANY v. ADAMSON.—
June 30.*

Contract—Reference—Declarator.

In 1859 the defender became contractor for the execution of certain works for the extension and improvement of Lossiemouth Harbour, according to plans and specifications prepared by Mr James Abernethy, civil engineer, London, on behalf of the pursuer. By the contract between the parties it was stipulated that, 'in the event of the contractor suspending the works fourteen days without sufficient cause, or of his becoming unable to carry on the works with efficiency, or to fulfil the conditions of the contract, the directors shall have power to take possession and complete the works by their own workmen, or to re-let the same to such other contractor as they may think proper, any additional expense which may be thus incurred to be deducted from the amount due to the contractor at the time.' It was also stipulated that, in the absence of the engineer-in-chief to the harbour directors, the resident engineer appointed by him should from time to time direct the order in which the work was to be proceeded with, and should be the judge of the quality of all workmanship and materials used in the construction of the works. The contract also contained a clause in these terms:—In the event of any question arising between the said harbour directors or the said resident engineer and the contractor on any part of these conditions and specifications, or as to the intent and meaning of any part of the contract-drawings, or as to the intent and meaning of the schedule of prices, their application to the payments to the contractor, or as to the mode of measuring the work or the execution and completion of the same, or as to the conditions inserted in this contract, or as to any other question of difference whatsoever, such questions or matter of difference shall be settled by the said James Abernethy, engineer-in-chief to the said harbour directors; or, in the event of his ceasing to be the engineer to the said harbour directors, by the engineer-in-chief for the time being to whom the same may be entrusted to carry on the works with efficiency, or to fulfil the conditions of the contract, the directors shall have power to take possession and complete the works by their own workmen, or to re-let the same to such other contractor as they may think proper, any additional expense which may be thus incurred to be deducted from the amount due to the contractor. In consequence of extensive additions to the original plans, the stipulated term for completing the works—1st January 1861—was departed from, the pursuers averring that the 1st April following was substituted, while the defender averred that no definite time was fixed. In that month a great part of the works was thrown down by a violent storm, and plans were prepared by the engineer, Mr Abernethy, for rebuilding that portion of the works in a more durable manner. The works were then proceeded with under the inspection of Mr Adkins, the resident engineer appointed by Mr Abernethy (who had been so from the outset), until the end of December 1861, when Mr Malloch was appointed his successor. On 2d January 1862, when the works were nearly completed, Malloch objected to a small portion of the work then in progress as not being in accordance with the plans and specifications, and reported the matter to Mr Abernethy. By the con-

tract the work was to be measured at the end of each month, and the contractor paid an instalment of the contract price, at the rate of 90 per cent. upon the measured value. The last measurement was up to 28th November 1861, on which the contractor had been paid his instalment. Before Malloch found fault with the work, the contractor had requested Mr Abernethy to measure the work up to the end of December, and issue his certificate for payment of the monthly instalment. In consequence of the contractor's refusal to comply with Mr Malloch's orders in regard to the work objected to, Mr Abernethy refused to issue his certificate, and the pursuers declined to pay the monthly instalment. The contractor then, on 13th January, withdrew from the contract on the ground that the monthly instalment was wrongously withheld from him. The pursuers had for some time previously been privately in communication with Mr Abernethy, to whom they represented that the works had been throughout insufficiently executed, and were not in accordance with the plans and specifications. Under Mr Abernethy's advice, the pursuers, after fourteen days' notice to the contractor, took the works into their own hands. The contractor, in March 1862, raised an action against the Harbour Company for payment of the balance of contract price due to him, and also for damages for breach of contract. In this action the Company averred that the works had been throughout insufficiently executed, and pleaded that the action was incompetent, in respect that the whole questions raised were within the reference clause in the contract, and fell to be decided by Mr Abernethy. On the other hand, the contractor pleaded—(1) that the reference to the Company's engineer was merely executorial of the contract between the parties, and that the primary contract being at an end, the reference was no longer operative; (2) that in any view there were legal questions involved which could not fall within the reference; and (3) that Mr Abernethy was disqualified from acting as arbiter, in respect that the sufficiency of his own plans was involved, and that he had, without hearing the contractor, expressed an opinion against him on the questions of difference. The Harbour Company then, in February 1863, brought the present action of declarator to have it found that the reference was still binding on the parties, and that the whole matters embraced in the action at the contractor's instance fell within the reference. Shortly afterwards the Company also raised an action of damages against the contractor for breach of contract. A record in all the actions was made up and closed, but the discussion was limited in the first instance to the action of declarator. The Lord Ordinary (Mackenzie) sustained the declarator; but to-day the Court, after hearing counsel on the contractor's reclaiming note, held that the contractor's claim for the balance of the contract price was still within the reference to the engineer, but that the claim for damages was not so, and therefore to that extent recalled the Lord Ordinary's interlocutor, no expenses being given to either party.

M.P., ROGERS' TRUSTEES v. ROGERS, ETC.—July 1.

Multiplepounding—Competency.

This was a multiplepounding brought in the names of the trustees of the late Mr Rogers of Northfield, and by two of the beneficiaries under

the trust-deed for the distribution of the estate. It appeared that, on the death of Mr Rogers' widow, who was liferented in the property, the trustees were directed to pay one of the children, Mrs Scott, a legacy of L.60 in a certain event, and thereafter to divide the entire residue equally among Mrs Scott and her two brothers, James and William Rogers, the real raisers. The L.60 was paid, and already each of them had received L.1500 each. There was still a balance of about L.1800 to divide; but Mrs Scott had claimed a debt against the estate, as executrix of her mother, of L.686; and the trustees were proceeding to take the opinion of counsel as to what they should do with this claim, when their proceedings were interrupted by the summons being raised. They now complained of this on the ground that Mrs Scott had neither taken nor threatened any legal proceedings against the estate, and very possibly would acquiesce if counsel would advise that the trustees ought not to entertain her claim. The Lord Ordinary (Jerviswoode) said the case was a very narrow one as respects the competency, but on the whole he thought it better that it should proceed. He therefore repelled the objections, and to-day the Court adhered.

LINDSAY v. FETTES' TRUSTEES.—July 2.

Liability of Trustees to aliment Bastard—Evidence.

This is an action for aliment at the instance of a person designing herself Phillis Mein or Fettes or Lindsay, widow, residing in Edinburgh, against the trustees of the late Sir William Fettes, of Comely Bank, Bart. The pursuer avers that she is the illegitimate daughter of Sir William Fettes; that he admitted the paternity to her and several others; and that, as she is now destitute, the defenders, as the trustees of her putative father, are liable for her support. The defenders denied the pursuer's averments, and pleaded *in limine* that these were not relevant to support the conclusions of the summons. The Lord Ordinary (Jerviswoode) repelled this plea, and appointed the cause to be enrolled for further procedure.

The defenders having reclaimed against this interlocutor, the Court called upon the pursuer to explain the kind of evidence by which she proposed to instruct the averments as to the alleged acknowledgments of the paternity by Sir William Fettes. It was stated for the pursuer that this would be done by the evidence of the pursuer herself, and of several persons who had learned from others now dead that Sir William Fettes had made the acknowledgments to them.

To-day the Court recalled the Lord Ordinary's interlocutor *in hoc statu*, and allowed the parties a proof before answer. Their Lordships stated that in the meantime they gave no opinion as to the competency of proving that a person now alive had heard a person now dead say that an acknowledgment had been made to him by another person also dead.

HOWDEN v. GLASSFORD AND OTHERS.—July 7.

Entail—Vitiation—'Dispone.'

This is an action of declarator at the instance of the trustee on the sequestrated estates of the late Henry Glassford of Dougaldston, against James Glassford Glassford of Dougaldston, and others. The object of

the action is to have it declared that the deed of entail, under which the defenders have right to the estate of Dougalston, is vitiated by certain erasures, and ought therefore to be reduced. The case having been sent to the whole Court, the Judges have unanimously held that the deed of entail in question is not liable to the objections stated to its validity.

The following excerpt from the opinion returned by the Lord Justice-Clerk, along with several of the other consulted judges, shows the nature of the question raised and the grounds of judgment:—

‘The only part of the deed in which it can seriously be said that there has been an erasure or vitiation of any moment, is in a single letter of the word in the prohibitory clause which now stands as “dispone.” The letter *n* is partly written on an erasure, but the erasure has not been such as to obliterate the original writing in that part of it, and the letter *s* can still be read there. There is a slight abrasion of part of the letter *o* in the same word, but not such as to destroy the letter, or prevent its identification. In these circumstances, we think the case is truly the same as if there had been no erasure, but merely the superinduction of the letter *n* over the letter *s*, the original letter being still visible; and we regard this alteration in the clause in which it occurs as an innocent and immaterial one, made obviously to correct an error of expression in the use of the word *dispose* for *dispone*. We are of opinion that either of these words would be sufficient for the purpose of the clause as importing a prohibition against alienation; and we thus think that the validity of the deed is not affected by the alteration that has been made. We wish, however, to guard against its being supposed that we should take the same view in a clause of a different description. In the dispositive clause of a deed of settlement regarding heritage, the use of the word *dispone* is essentially necessary as a technical term, for the purpose of constituting a conveyance. The word *dispose* standing by itself would not, in our opinion, have the same effect. If, therefore, in the dispositive clause of a deed, the word had been originally *dispose*, and had then been altered by erasure or superinduction to *dispone*, we are not to be understood as holding that the deed would be good. The word *disposse* is a wider and more general term than *dispone*. It would not, we think, import the precise solemn act of conveyance implied in the word *dispone*, and would therefore not be an equivalent for the proper technical term where *dispone* was essentially necessary. But the present is not the case of a dispositive clause; it is the case of a prohibitory clause; and the very fact that *dispose* is more comprehensive than *dispone*, makes it equally effectual for the purpose here in view. A clause prohibiting the general act of *disposing* must include a prohibition of the specific act of *disponing*.’

JARDINE'S TRUSTEES v. CARRON COMPANY.—July 9.

Damages—Order for Inspection of Property.

This is an action of damages against the Carron Company, at the instance of the trustees of a late shareholder. The ground of action is that the late Mr Jardine was induced to sell his shares greatly beneath their value, in consequence of the Company having fraudulently understated their profits and misrepresented the value of their property, whereby the shares were kept below their proper value in the market. The pursuers

aver, *inter alia*, that the Company understated the amount of wrought minerals on hand in 1851 by about L.60,000, and that they represented in the balance-sheets at that time their unwrought minerals as of about L.95,000 less value than they really were. To-day the pursuers applied to the Court to give them access to the defender's stores for the purpose of examining the quantity of wrought minerals now on hand, with the view of enabling them to prove at the trial that the greater part of the minerals now there was on the ground in the same condition in 1851. They also asked access to the underground workings of the defenders, for the purpose of being able to prove at the trial their averment that the value of the unwrought minerals had been greatly understated in the balance-sheets. The Carron Company opposed both applications, on the ground that it might be detrimental to their interests to have the amount of their stock and modes of working made public.

The Court granted both applications, holding that the information which the pursuers sought to recover was pertinent to the issue to be sent to trial; and that being so, the risk of loss to the defenders consequent on disclosure was not a good answer.

Lord Curriehill dissented, holding that whilst it was quite common to give one litigant access to the books and documents of the other to be used as evidence, there was no precedent for giving access to the premises of the party, and he thought it would be dangerous to introduce that new rule.

The trial was appointed to take place at the ensuing sittings, but the case has since been compromised.

Dec., FINDLAY v. MAXWELL.—July 13.

Property in Minerals—Prescription—Title to Sue.

The proceedings in this case originated in an application for interdict to the Sheriff of Lanarkshire, at the instance of Mr Maxwell of Baillieston, against Mr John Findlay of Springhill, Mr Maxwell being the proprietor of the surface of a small piece of land called the outfield ground of Barrachney, while Mr Findlay was proprietor of the coal. The object of the application was to have Findlay interdicted from using a pit situated in said outfield ground for the purpose of removing coal wrought in the adjoining ground of Ward Park, of which he is tenant under Mr Buchanan of Drumpeller, and which had at one time formed part of the same estate with the outfield. The defence was, that when the subjects were united, constituting what was then called the five-merk land of old extent of Barrachney, the superior had made a grant of a *pro indiviso* half of the coal of the entire estate, with the usual privileges of working and winning; and that this general right still subsisted notwithstanding the subdivision both of the lands and the surface. Interdict having been granted in the Sheriff Court, Mr Findlay advocated, and was allowed by the First Division of the Court to bring a declarator of his right. An action of declarator was accordingly brought, in which the pursuer sought to deduce the titles of both parties from a common ancestor, in order to establish that the powers of working contained in his titles were binding on the defender. On 5th February 1862, the Lord Ordinary (Lord Neaves) pronounced an interlocutor, in which he 'finds that the pursuer, John Findlay, has not produced or set forth any valid

and sufficient right or title, or condescended on any relevant facts to support or enable him to prevail in the conclusions of the action affecting the rights and interests of the defender; and finds that, apart from such conclusions, the action is unnecessary as well as inept. Therefore dismisses the action, and decerns. Finds the defender entitled to expenses, etc.' The action having come before the First Division on a reclaiming note, their Lordships on 3d December 1862 ordered cases, which were accordingly given in, and the cause was now advised. The titles of the pursuer were unusually complicated, but the argument turned chiefly on the construction of an instrument of sasine dated 19th March 1733, on a disposition (not recovered) by John Orr, the common author of the pursuer and the defender, containing a reservation of what the pursuer maintained to be one-half of the property of the coal of Barrachney, but which the defender considered to be merely the reservation of a personal privilege of working the coal and sharing the profits with the disponent. The pursuer founded on this claim of reservation, and also on the powers of working contained in the titles to the other half of the coal, which he had also acquired. The defender disputed his right on the merits, and also contended that the pursuer, being at the date of instituting the action only a part owner *pro indiviso* of one of the mineral subjects, and lessee of the other, had not a proper title to sue in a question with a conterminous proprietor. Before advising the case, their Lordships allowed a plea to this effect to be added to the record, and in the result unanimously affirmed the judgment of the Lord Ordinary.

M'PHUN v. INGLIS.—July 14.

Declarator—Title to Sue.

This is an action of declarator and reduction at the instance of William Lyon M'Phun, accountant in Glasgow, trustee on the sequestrated estate of William Inglis, sometime merchant in Glasgow, and is directed against the bankrupt's wife and her children, the bankrupt himself for his interest, and Mr Thomas Charles Young, writer in Glasgow. The action is for the purpose of having it declared that two dispositions of heritable property, executed by the defender Young in favour of Mrs Inglis and her children, were truly made with funds that belonged to the bankrupt, and therefore that the right to these properties belongs to the pursuer, as trustee on the bankrupt's estate; and alternatively, that in the event of any right being held to be constituted in the person of Mrs Inglis by these conveyances, they shall be held to be donations *stante matrimonio inter virum et uxorem*, revocable and revoked by the sequestration. The summons includes reductive conclusions, in the event of this being found necessary, and a declaratory conclusion that the defender Young is bound to convey to the pursuer, and that the pursuer has right to make up a feudal title to the subjects. Mrs Inglis pleaded, as a preliminary defence to the action, that the pursuer had no title to insist, because the fee of the properties, the conveyances of which were sought to be reduced, was absolutely vested in the defender Young, by a sale to him in 1860, in which she, on account of her liferent interest, concurred, and it was *ius tertii* to the pursuer claiming right through the bankrupt to insist on a reduction of the conveyance to Mrs Inglis, without impeaching the con-

veyance to Young. The Lord Ordinary (Ormidale) heard parties on the preliminary plea, and repelled it, and the Court adhered.

SECOND DIVISION.

TITTLER *v.* REID AND COX.—June 18.

General Turnpike Act—Liability for Toll Dues.

The pursuers in this action are the trustees of the Lasswade and Wright's Houses United District of Roads. The defender, Mr Cox, is proprietor, and Mr Reid is tenant, of Powburn Tanwork. The question in dispute is whether the defenders are liable in toll when passing through Powburn Toll-bar. The tanwork is situated considerably within 100 yards of the toll-bar, which is placed about three yards outside the parliamentary boundary, and the defenders claim exemption from toll by virtue of section 37 of the General Turnpike Act, 1 and 2 Will. IV., c. 43—'That no toll shall be demanded or taken from any person for any horses, cattle, or carriages, which shall not travel altogether above 100 yards on any road, in whole or in part, before or after passing any bar at which toll-duty is leviable for using the same.' They contend that the only portion of road between the tanwork and Edinburgh for which toll-duty is leviable is that outside the parliamentary boundary, over which they do not travel for a distance of 100 yards; and that the portion of the road within the parliamentary district not being a road for which toll-duty is leviable, the exemption holds directly in their favour. The Lord Ordinary (Kinloch) found against the defenders.

The defenders reclaimed, but the Court adhered, holding that the Edinburgh Road Act conferred only privileges upon persons residing within the parliamentary boundary, but did not alter the character of the road between Crosscauseway and Liberton Dams as a *unum quid*, and as a road for which toll was leviable.

SMITH *v.* JOHNSTON.—June 21.

Contract—Acceptance.

Walter Smith, farmer, near Edinburgh, raised an action in the Sheriff Court of Edinburgh against Alexander Johnston of Hillhouse, for delivery of certain quantities of grain which the pursuer alleged had been sold to him by the defender through his agent James M'Intosh. It appeared that in September 1862 the crops on Hillhouse were advertised for sale by private bargain, and reference made to M'Intosh, to whom offers were to be made: That on the 25th September, the pursuer, along with M'Intosh, Barlas, and another, inspected the said growing crops, and made an offer therefor, which was accepted by M'Intosh: That it was agreed that the grain was to be delivered to the pursuer at his premises at Dean: That after the bargain was made it was proposed to put it in writing, and that the pursuer at the request of M'Intosh wrote out an offer, when he was told that he could not get an acceptance at the time, the paper being wet, but that he would get it sent him next morning: That on the same evening M'Intosh stated to several persons that he had been selling growing crops to the pursuer. The Sheriff-

substitute found for the pursuer, and ordained the defender to make delivery of the grain to the pursuer as sought.

The Sheriff, on appeal, adhered. The defender reclaimed (pleading that M'Intosh had no authority to sell, and that there being no written acceptance the contract was not binding); but to-day the Court adhered.

ADDIE v. PINKERTON.—June 22.

Contract—Remuneration for Services—Proof.

John Pinkerton raised an action in the Sheriff Court of Lanark against Robert Addie, ironmaster, Glasgow, for L.162, 10s., being salary at the rate of L.75 per annum due to him for acting as mineral searcher in the employment of the defender for two years and two months, from 12th September 1860; and for L.54, 3s. 4d. of travelling and other expenses, calculated at the rate of L.25 per annum, under deduction of L.140 received by the pursuer to account of salary and expenses, leaving a balance of L.76, 1s. 5d. The pursuer's evidence as to the amount of remuneration agreed upon between him and the defender was to the effect that, after one or two meetings with the defender, the defender proposed to allow him L.50 a year and travelling expenses, which offer he, the pursuer, refused as inadequate; that he then stated that he would write his terms in a letter. He produced a copy of this letter, in which he offered his services for three days a week at the yearly salary of L.75, with travelling and other expenses. This letter, he stated, was posted either by himself or his son, but he received no answer to it. The defender admitted the employment, but at a salary of only L.50. He stated that he had no recollection of having received any such letter as that averred by the pursuer to have been sent to him. He pleaded that, it not having been proved that any such letter had ever been sent to or received by him, no effect could be given thereto; and that the pursuer was not entitled to any sum for travelling expenses, there being no proof that the defender had ever agreed to pay any such, or that any such had been disbursed by the pursuer. The Sheriff-substitute (H. G. Bell) found that there was no definite agreement as to salary; that the pursuer proposed a salary of L.75, with travelling and other expenses, which proposal was neither accepted nor rejected; that L.75 per annum was a reasonable remuneration on the principle of a *quantum meruit*, and that L.15 was a reasonable sum for travelling charges. The Sheriff on appeal adhered, increasing the latter sum to L.25 as concluded for.

To-day the Court held that neither contract alleged by the parties had been proved; that the principle of *quantum meruit* could only be applied to the case of services proved or admitted to have been rendered. The question came therefore to be whether the services for which remuneration was claimed were rendered to the extent which the pursuer alleged. On the evidence, it not being established that the services were for more than two days a week, L.50 a year was sufficient remuneration. As to the question of travelling expenses, the pursuer claimed not actual disbursements, but an annual allowance. The pursuer would be entitled to a proportional payment for his last two months' service, which, at the rate of L.70 a year for salary and expenses, would give him L.11 odds. Judgment accordingly.

Pet., JOLLY.—June 25.

Public Records—Petition for Delivery of Deed.

This was a petition at the instance of Robert Jolly, now residing in London, and John Court, S.S.C., his factor and commissioner, for leave to get up, from the custody of the Lord Clerk Register, a principal deed of factory and commission, executed by Mr Jolly on 25th April 1863. The petition was opposed on behalf of the Lord Clerk Register, on the ground that it would prove a dangerous precedent, in a case where no absolute necessity was shown for the withdrawal of the deed from the custody of the keeper of the records, to allow a deed recorded for preservation to be borrowed, not for the proper purpose of the deed, but for an altogether collateral purpose. The Court desiring more information, consideration of the petition was superseded to allow the petitioners to state in a minute, (1) Whether Mr Jolly was capable of authorizing the present application; (2) Whether Mr Jolly was suffering from paralysis before signing the deed of factory, and had merely become worse; and (3) Whether there were in existence any other documents signed by him about the same time.

Counsel were heard yesterday on the petition and minute, and to-day the Court gave judgment granting the prayer of the petition.

MARQUIS OF BUTE v. MAGISTRATES OF ROTHESAY.—June 23.

Schoolmaster's Salary—Effect of Decree of Disjunction and Erection.

The question in this case was, whether the heritors of certain lands which, in 1844, were disjoined from the parish of Rothesay, and erected into a new parish called North Bute, are liable to bear a portion of the schoolmaster's salary for the parish of Rothesay. The facts were not disputed, but the parties differed as to the legal effect of the decree of disjunction and erection. The pursuers contended that the decree exempted the lands disjoined and erected from parochial burdens within the parish of Rothesay, and rendered them liable to similar and corresponding burdens within the new parish of North Bute, subject only to the qualifications specified in this decree. The defenders pleaded that the decree operated only on a decree of disjunction and erection *quoad sacra*, without altering the rights and obligations of the heritors *quoad civilia*, except in so far as expressly specified in the decree, and that the decree having made no change on the educational arrangements of the parish of Rothesay, the heritors of North Bute remain liable for their several proportions of the salary payable to the schoolmaster of Rothesay. The Lord Ordinary (Lord Mackenzie) found for the pursuers, holding that the decree, not being qualified by the words *quoad sacra*, operated as a decree of disjunction and erection *quoad omnia*, and that the heritors of North Bute, though liable to provide a salary for the schoolmaster of North Bute, were not bound to contribute to the salary of the schoolmaster of Rothesay.

The defenders reclaimed, but to-day the Court adhered.

ALEXANDER v. OFFICERS OF STATE.—June 29.

Reclaiming Note—Competency—Burden of Proof.

This was a note, at the instance of A. W. F. Alexander, praying to be sisted in room of his late father, Alexander Alexander, as defender

and reclaimer in certain actions. It appears that in 1830, Alexander Alexander served heir-in-general to the deceased Sir William Alexander, first Earl of Stirling, described in the briefs as his great-great-grandfather. In 1831 he expedite a special service to the same Earl of Stirling in large tracts of land in North America. In 1833 the Officers of State raised a reduction of these services, and of certain other deeds, in which action the Lord Ordinary (Lord Cockburn), on 20th December 1833, pronounced an interlocutor finding that the defender, Alexander, had failed to prove his alleged character as lawful and nearest heir to the Earl of Stirling, and therefore reducing the two services and retours proceeding thereon. Alexander reclaimed. Before the reclaiming note came to be advised, Alexander was indicted and tried, in April 1839, on a charge of forgery of certain documents produced by him in support of his claim. The jury found that certain of the documents were forged, but found it not proven that the panel had forged any of the documents, or had uttered them knowing them to be forged. When the reclaiming note came to be advised, no appearance was made for Alexander; and this Court, on 9th July 1839, in respect of no appearance, adhered to the Lord Ordinary's interlocutor. In May 1840 the case was remitted to Lord Cunningham, Ordinary, to proceed farther therewith, and to dispose of the other points raised. On 2d June 1840, there being no appearance for the defender, his Lordship decerned in terms of the other conclusions of the action. This judgment, along with the previous one of the Inner House reducing the services, was extracted on 19th June 1840. On 27th August 1841, an appeal was presented to the House of Lords against the interlocutor of the Inner House, of date July 1839. In the course of the discussion in the House of Lords, the appellant, on 11th February 1845, presented a petition for leave to amend his appeal, and to add to it an appeal against the Lord Ordinary's interlocutor of 2d June 1840, which petition was refused. Alexander then raised a process of wakening before the Lord Ordinary. His Lordship wakened the process, and subsequently allowed Alexander, in terms of 48 Geo. III., c. 151, sec. 16, to reclaim against the interlocutor of 2d June 1840, as having become final through mistake or inadvertence. When the case came before the Inner House on 17th June 1845, their Lordships refused to do anything in the matter, holding that the process had been taken out of Court by the extract, and that without a special remit from the House of Lords they could not entertain the appeal. On 19th February 1846, the House of Lords remitted the cause to the Court of Session, with an order to consider the reclaiming note, reserving all objections which the respondents might have to the prayer of the reclaiming note being granted. No step was taken after this remit until the present note for A. W. F. Alexander was presented to the Court, praying to be sisted in room of his father deceased, and for consideration of the reclaiming note. Yesterday the petitioner was sisted to the effect of enabling the Court to consider the reclaiming note. Counsel for the Officers of State were heard on objections to the competency of the note, and to-day the Court gave judgment, overruling the objections to the note, and remitted the case to the summar roll.

FINLAYSON AND OTHERS v. BRAIDBAR QUARRY COMPANY.

Contract for Furnishings—Truck Act.

The pursuers in this action, merchants in Pollockshaws and Paisley, sought to recover from the defenders the sum of L.153, 5s. 8d. for goods furnished to the said defenders, conform to account commencing 19th February and ending 1st June 1860. It was stated in the condescendence, that in September 1857 the Braidbar Quarry Company began to deal with the pursuer Finlayson, by granting to their workmen orders on him, authorizing him to make advances to the person named in the order to a certain fixed amount; that goods were furnished in this way to a large amount, and that every fortnight an account was furnished to the Company of the supplies advanced; and that from time to time payments to account were made to Finlayson by Stevenson, the managing partner of the Company; that these payments were sometimes in cash, sometimes by means of bills, which, though signed by Stevenson in his individual name, were granted for Company debts, and were received as binding the whole Company. The defenders pleaded that Stevenson was not entitled, in virtue of his powers as a partner, to enter into the course of dealings alleged in the summons; that the goods, if furnished by the pursuers, must be held as having been furnished exclusively on the personal credit of Stevenson; and that the contract entered into between Finlayson and Stevenson was illegal, as being contrary to the provisions of the Truck Act, 1 and 2 Will. IV., c. 37, which prohibits the payment, in certain trades, of wages in goods, or otherwise than in the current coin of the realm. The Lord Ordinary (Lord Mackenzie) found for the pursuers, holding, on consideration of the proof, that the furnishings must be held to have been made upon the credit of the Company, and that the Truck Act did not here apply. He held that here there was no contract between the Braidbar Quarry Company and their workmen that their wages were to be paid in goods; neither were the goods sold to the workmen at any shop or store belonging to the Company, or in the profits of which the employers had a share or interest. The Quarry Company reclaimed.

To-day the case was advised, when the Court reversed the judgment of the Lord Ordinary, and held that the pursuer had failed to prove his case.

Note of App., WILLIAM SMITH.—July 2.

Sequestration—Appeal.

This was an appeal presented by William Smith, distiller at Benrinnes, in the parish of Aberlour and county of Banff, and presently a prisoner in the jail of Banff, against a deliverance of the Sheriff-substitute refusing a petition for his liberation. The facts out of which the proceedings arose, as stated to-day by the respondent, were these:—On the 13th of June, the respondent and incarcerating creditor, Mr David Edward, farmer, Gauldwell, obtained a warrant to imprison Smith on an extract registered protest of a promissory note for L.73, 3s. 9d. On the 14th an officer proceeded to Keith with this warrant, and took Smith into custody. The officer was unable to take his prisoner to Banff by the first train after the apprehension, which occurred about twelve in the forenoon, but he did so by one that was due in Banff at ten minutes past eight. The same train that carried the officer and Smith took a petition from Smith's

agent applying for sequestration, and craving a warrant of protection. Upon this petition the Sheriff, about nine o'clock of 14th June, awarded sequestration and granted protection; but the train that took the petition arrived in Banff without Smith and the officer. On the road Smith opened the door of the railway carriage, while the train was in motion, and jumped out with a view of making his escape. He was, however, followed by the officer, who, after a considerable race, succeeded in again getting hold of his prisoner. There being no other trains for Banff that evening, some delay occurred in getting Smith removed to jail, and it was late that evening or early on the following morning that he was lodged in prison. The warrant of protection, as required by the statute, was intimated to Mr Gordon, solicitor, Keith, the known agent of the incarcerating creditor, but not until the evening of the 15th June, after the prisoner was in jail. Smith thereafter presented a petition to the Sheriff, setting forth the fact of his imprisonment, which, he maintained, was in the face of the warrant of protection illegal, and also the 45th sec. of the Bankrupt Act, which provides that a person in prison, after sequestration has been granted, may apply to the Sheriff for a warrant of liberation, and claiming to be liberated. To this the respondent pleaded in the inferior Court that this was a petition claiming liberation as a matter of right, and not a petition under the Bankrupt Act asking it as an act of grace; and that the imprisonment and the detention being in the circumstances perfectly legal, the petition should be dismissed. The petition was dismissed by the Sheriff, and Smith then brought the present note of appeal to the Court of Session, under the 46th section of the statute. To-day, at the discussion, it was mentioned by the appellant that, at the meeting of creditors on the 27th June, it was unanimously resolved to renew the warrant of protection granted to the bankrupt for four months, to which the respondent replied that he had no desire to keep the appellant longer in prison, but he objected to his getting out under this petition as a matter of right. The Court, in respect of this admission by the respondent, remitted to the Sheriff-substitute to liberate the appellant, but *quoad ultra* dismissed the appeal.

KIRKPATRICK v. BELL'S EXECUTORS.—July 8.

Trust—Legacy—Proof.

The pursuer in this case executed, in 1858, a trust-disposition and settlement, providing, *inter alia*, a legacy of L.500 to Mr George Bell, and L.500 to Miss Elliot, whom failing, to her daughter. In 1859, the sum of L.1000 was paid by the pursuer to Mr Bell. The condescendence avers that, after informing Mr Bell of the legacies which were intended to be left to him and his sister, and explaining that the object which the pursuer had in view was to secure the payment of these legacies, in the event of the legatees surviving her, by handing over the amount to him for their behoof, but to bear interest at 4 per cent. so long as it remained in his hands, and subject to all the conditions of the legacies themselves, the sum of L.1000 was deposited in his hands, and the deposit accepted of by him on these terms. After the death of Mr Bell, in 1861, the pursuer applied to his trustees for repayment of the L.1000, and now raised this action therefor. The defenders resisted payment. They averred that they had no personal knowledge of the circumstances under which the money was given to Mr Bell, but stated

that there had been found in his repositories a draft of a letter, dated in 1859, to a gentleman in Liverpool, in which it was stated, 'When she gave me two bills of exchange for L.500 each, with the memorandum I showed you of one-half being for myself and the other for my sister, Mrs Elliot, in liferent, and her daughter in fee, the only condition was that I should pay her 4 per cent. during her life.' This annuity at the rate of 4 per cent. had been paid, the defenders averred, to the pursuer by Mr Bell during his life, and they were willing to continue to pay the said annuity. The Lord Ordinary (Lord Barcaple) found it not proved that it was the intention and understanding of the pursuer that the said sum of L.1000, or any part thereof, should be held by the said George Bell in trust as the property of the pursuer, to be paid to her on her demanding the same, or in the event of the said George Bell predeceasing her, and that the pursuer had not established any sufficient ground to support the demand now made by her in this action for repayment of the said sum, but reserving to the pursuer, and to all parties interested, to take such steps as may be just for securing or giving effect to the purpose for which this sum of L.500, stated in the said memorandum to be to the said Mrs Elliot, whom failing to her daughter, was given to the said George Bell. His Lordship held that the transaction in question had, *prima facie*, the aspect of payment by the pursuer, during her own life, of money which she had previously intended to bequeath to Mr Bell and his sister and her daughter, L.500 being paid to him for his own behoof, and L.500 as trustee for behoof of Mrs and Miss Elliot.

To-day the Court reversed the judgment of the Lord Ordinary.

Susp. and Int., TROWSDALE AND SON, CONTRACTORS, v. CHARLES JOPP, C.E., AND THE NORTH BRITISH RAILWAY COMPANY.—July 8.

Contract—Submission.

This was a suspension and interdict raised by the contractors to prohibit Mr Jopp from acting as arbiter under a submission to him, contained in the contract for executing part of the railway from Galashiels to Peebles. The contract provided that if the contractors did not employ a sufficient number of workmen and materials to ensure the completion of one portion of the works by 1st July 1864, and the other by 1st January 1865, the railway company could apply to the arbiter, who should have power to authorize the company to employ additional workmen and materials at the expense of the contractors, or, if necessary, to take the works entirely out of the contractor's hands. There was this further provision, that Mr Jopp should not be disqualified from acting as arbiter through being one of the railway company's engineers. As the works were not being carried on with sufficient vigour, the railway company applied to the arbiter for power to employ additional men and materials, when this suspension was brought, the contractors alleging that they had been prevented from completing the works through the fault of Mr Jopp himself, and that therefore he was disqualified from acting as arbiter.

The Lord Ordinary refused the note of suspension and interdict, and the contractors reclaimed. The Court, without calling on the railway company, refused the reclaiming note, and adhered to the Lord Ordinary's interlocutor.

DUFF'S TRUSTEES v. SHAND'S TRUSTEES.—July 14.

Factory—Bond of Caution.

General Duff's trustees raised this action against the now deceased Robert Shand, advocate in Aberdeen, and now insisted in it against his trustees and executors, to have the defender ordained to make payment to the pursuers of L.1492, 12s. 3d., as the amount due by John Blaikie, advocate in Aberdeen, in respect of his intromissions as factor for the pursuers on the estate of Careston, and for which the defender bound himself jointly and severally with John and Anthony Blaikie, conform to bond of date 26th May 1853. The pursuers averred in their condescendence, that, as trustees under the settlement of the late General Duff, they were in and prior to 1853 in right of the life-interest of the last Earl of Fife, as heir of entail of the estate of Careston, and continued to be in right thereof till his death on 9th March 1857; that in 1853 they appointed Mr John Blaikie factor on the estate, and obtained a bond of caution, signed by Mr A. Blaikie and the defender; that Mr John Blaikie continued to act as factor for the pursuers until their interest in the estate ceased, and drew all the rents thereof which belonged to them, including those down to 9th March 1857; that, upon his intromissions as factor, Mr John Blaikie was still due to the pursuers the sum sued for. The estates of Mr J. Blaikie having been sequestrated on 23d May 1860, and the estates of Mr A. Blaikie having been sequestrated on 30th April 1860, the pursuers applied to Mr Shand for payment of the above sum, and now raised action therefor. The defender averred that the pursuers had no right, either by themselves or their factor, to any of the rents for possession by the tenants subsequent to Martinmas 1856; that the sole right to these rents was vested in the present Earl of Fife or his trustees; that these trustees appointed Mr J. Blaikie to be their factor, and that it was in his character of their factor that Mr Blaikie uplifted from the tenants any rents of Careston payable for possession subsequent to Martinmas 1856. He further averred that, by the common law of Scotland, the pursuers, in consequence of the death of Lord Fife in March 1857, had no right to any rent for possession subsequent to Martinmas 1856; that it was only by virtue of the Apportionment Act, 4 Will. IV., c. 22, that the pursuers had any claim to the rents for the possession of tenants for the period between Martinmas 1856 and March 1857; and that under that statute the pursuers had no claim for rent against the tenants of the lands, but only a claim of debt against the new proprietor for a proportion of the half-year's rents received by him, or which he was entitled to receive from the tenants.

The Lord Ordinary (Lord Mackenzie) decerned against the defenders, holding that the pursuers' claims were covered by the bond of caution.

Shand's trustees reclaimed.

To-day the Court reversed the judgment of the Lord Ordinary, holding that Mr John Blaikie was not entitled, under the factory which he held from General Duff's trustees, to recover from the Earl of Fife, or his trustees, a proportion of rent for crop 1857, payable by them under the Apportionment Act.

MACKINTOSH v. MACKINTOSH.—July 15.

Damages—Injury to Lands by Fire.

The present defender, Mackintosh of Farr, raised an action in the Sheriff Court of Inverness, against the present pursuer, Mackintosh of Holm, concluding for damages on account of an alleged injury to his lands by fire raised within the Holm property, and which spread to the property of Farr. The Sheriff, by interlocutor of 10th April 1858, found that the defender in that action, Mackintosh of Holm, was liable in damages, and gave decree accordingly. The amount of damage was, in terms of a joint minute, fixed by arbitration. Mackintosh of Holm then brought an action of reduction in the Court of Session. He contended that the minute of reference was invalid, having been signed on his behalf without authority. The Court sustained the minute as valid and binding. The case was then discussed on the merits; and the Lord Ordinary (Lord Kinloch), on 20th February last, pronounced an interlocutor affirming the judgment of the Sheriff, and holding the pursuer liable to the defender for the injury and damage caused to the defender by the said fire. His Lordship held that in the present case the operation of whin-burning was attended with great danger to the adjoining property, and that the owner of the lands upon which the fire was kindled must be held responsible for the consequent damage, unless the Court was satisfied that no amount of care or precaution could have prevented the result, and that the extension of the fire to the adjoining grounds arose out of causes over which he had no control. On considering the proof, however, his Lordship was of opinion that proper precautions had not been taken to see that the fire was extinguished; but that, on the contrary, the fire was allowed to smoulder, without due consideration of the damage thereby occasioned to the adjoining lands. The pursuer reclaimed.

To-day the Court by a majority recalled the interlocutor of the Lord Ordinary, holding that the operation of muir-burning being a lawful act, the proprietor of the lands where the burning took place could not be held liable for the consequences of the extension of the fire to adjoining lands, unless negligence in endeavouring to extinguish the fire should be proved against him, but holding that in the present case there was sufficient proof of negligence on the part of the present pursuer's servants, and therefore on that ground assoilzieing the defender from the further conclusions of the action.

MINISTER OF BARRY v. PATRON, ETC., OF PARISH OF BARRY.

Teinds—Claim of Exemption from Payment—Prescription.

The Rev. James Somers, minister of the church and parish of Barry, raised a summons of augmentation, modification, and locality against the patron, titular, tacksmen of the teinds, heritors, and liferenters of the said parish. On 25th November 1857, the Court modified a stipend of seventeen chalders. In the process of locality following thereon, the Earl of Dalhousie lodged objections to the interim scheme, objecting to his lands of Cowbyrea and of Links of Barry being localled on for stipend, in respect that these lands having been Church lands, and having

been since 1552 and being now held by the objector and his authors under a valid title from the Abbot and Monastery of Balmerino, *cum decimis inclusis et nunquam antea separatis*, are not now liable to be localled on; and pleading further, that, at all events, the said lands having for forty years and upwards been held by the objector and his authors under a good prescriptive title, *cum decimis inclusis et nunquam antea separatis*, and never having paid teind duty or been localled on, are not now liable in payment of stipend. It was answered for the minister, that the titles and documents produced by the objector were not sufficient to instruct his allegation that the said lands were exempt from liability for stipend, and that there was no proof that the monks of Balmerino, the granters of the feu-right upon which this objector founded, held their lands with immunity from teind, or had power to feu them *cum decimis inclusis et nunquam antea separatis*. It was answered further, that, supposing the terms of the clauses founded on were sufficient to exempt the lands in question from being localled on, the objector's right never having been consented to or confirmed by either the Pope or the Crown, could be of no avail to him in the present discussion.

The Lord Ordinary (Lord Ormisdale) found that the Earl of Dalhousie had failed to instruct a valid *decimæ inclusæ* right to the lands in question.

To-day the Court adhered in substance to the judgment of the Lord Ordinary, reserving, however, their opinion on the latter of the grounds upon which his Lordship's interlocutor was based.

BEETRAM AND OTHERS v. PRESBYTERY OF LANARK.—July 20.

Church—Liability of Heritors.

The following statement of the facts of this case is taken from the note to the Lord Ordinary's (Ormisdale) interlocutor:—It appears from the documents produced that the parish church of Carnwath had got into such a state of disrepair, so far back as 1852, that the heritors then considered it right to consult an architect (Mr Spence) on the subject; but the matter was not followed out to any definite or practical conclusion at that time. In 1860, however, the heritors again took up the matter, and obtained the report of the late Mr Peter Hamilton, architect, on the state of the church. They also subsequently obtained reports in regard to the church from Mr Bryce and Messrs Peddie and Kinnear, architects. All of these gentlemen concurred in describing the church as in a very dilapidated condition, not only uncomfortable, but positively unsafe for a congregation to worship in. In place, however, of proceeding to act on the reports referred to, obtained by themselves, the heritors delayed doing anything, and seem to have been guided by the non-professional advice and opinion of sub-committees of their own number. It was in this state of matters that the Presbytery considered it their duty to interpose; and on the application of the minister of the parish, after obtaining the report of Mr Rhind, architect, and of Mr John Sherman, builder, Edinburgh, they pronounced the decree now complained of, ordaining the existing church to be taken down and a new one built. The complainers then presented the present suspension of the Presbytery's decree.

The Lord Ordinary, without attempting to state any precise rule or test applicable to all cases of the present class, thought it sufficient to say that in this instance he held the Presbytery's decree to be well-

founded, in respect (1) that the existing church of Carnwath could not, by mere repairs, in any reasonable sense of that expression, be rendered serviceable and fit for the congregation to worship in; (2) that, accordingly, reconstruction and additions are to some extent indispensable; and (3) that, even if the reconstruction and additions referred to were to be viewed and dealt with as repairs, still the whole expense of rendering the church serviceable and fit as a place of worship would be so great as, in all the circumstances, to warrant the building of an entirely new church.

Bertram reclaimed, but to-day the Court adhered to the judgment of the Lord Ordinary.

Sus., STEWART v. WATSON.—July 20.

Lease—Enforcement of Irritancy.

The suspender, John Stewart, is the tenant of the farm of Fettes, in the parish of Lenchar, Fifeshire, and the respondent, the Rev. David Watson, is the minister of that parish and proprietor of said farm. He has obtained against the suspender a decree of removing from the farm, and the object of the present application for interdict is to prevent his enforcing that decree. The decree was obtained in the Sheriff Court of Fifeshire, in an action raised by the respondent. The leading facts appear in the interlocutor of Sheriff-substitute Taylor, to which Sheriff Mackenzie adhered, in which he finds that in 1852 the defender became tenant of the lands and farm of Fettes, under the pursuer, on a lease for nineteen years, at a yearly rent of L.80, which rent was payable in two equal portions—one at Whitsunday and the other at Michaelmas—annually, for the preceding year and crop: Finds that by the said lease it is expressly provided and declared, *inter alia*, that “if, by allowing the rent thereby contracted to run into arrear, the tenant shall suffer a sequestration at the proprietor’s instance to be applied for and awarded against him, then” “this lease shall, in the option of the proprietor, become *eo ipso* null and void, without the necessity of any declarator or action for that purpose, and the proprietor shall be at liberty to resume possession of the said lands and others,” and “the said John Stewart shall be obliged to renounce, as he thereby renounces, the said lease and possession of the said lands, houses, and others thereby let:” Finds that the second moiety of the rent for crop and year 1862, payable at Michaelmas 1863, was not paid by the defender at the stipulated term, and that the pursuer, in consequence, on 3d October following, applied for and obtained a warrant of sequestration of the defender’s crop and stocking for payment of said arrear, and in security of the rent payable in 1864 for crop and year 1863, which warrant was served and executed on the said 3d October 1863: Finds that no appearance was entered by the defender in said action of sequestration: Finds that, on the 23d November 1863, the pursuer raised and executed the present action, and that the defender, on the following day, paid to the pursuer, through his agent, the said arrear of rent payable at Michaelmas 1863, for which sequestration had been awarded as aforesaid: . . Finds that the event which was agreed as aforesaid to form a ground of irritancy of the said lease has occurred, and that the lease has in consequence become null and void; but in respect no time for the defender’s consequent removal is specified in the lease, and that his instant removal

between terms is not stipulated, and is not necessarily to be presumed, while it is a fair and reasonable presumption that his removal was understood to be enforceable at a legal term: Finds and fixes the term of Whitsunday 1864, being the next legal term after the irritancy was incurred, as the date at which the defender shall be bound to remove from said farm,' etc. Immediately on Sheriff Mackenzie adhering to this judgment, the tenant applied to the Bill Chambers for interdict. Lord Barcaple, after answers had been lodged, refused the note, and found the complainer liable in expenses; and to-day the Court unanimously adhered to his Lordship's interlocutor with expenses.

English Cases.

FREIGHT.—A charterer, whose cargo has been damaged by the fault of the master and crew, so as upon arrival at the port of discharge to be worth less than the freight, is not entitled to excuse himself from payment of freight by abandoning the cargo to the shipowner.—(*Dakin v. Oxley*, 33 L. J., C. P. 115.)

MINE.—The owner of the upper of two adjoining mines is not liable for injury by water flowing by gravitation into the lower mine from works conducted by him in the usual and proper manner for the purpose of getting mineral from any part of his mine; but he must not interfere with such gravitation so as to make it more injurious to the lower mine or advantageous to himself; for if he do so, and be thereby an active agent in sending water to the lower mine, an action will lie against him by the owner of the lower mine for the injury it may occasion.—(*Baird v. Williamson*, 33 L. J., C. P. 101.)

DEFAMATION.—Defendant having dismissed plaintiff from his service as gardener, wrote to E., on whose recommendation defendant had originally engaged plaintiff, stating, *inter alia*, the following:—'On Saturday I had another scene with F. (the plaintiff) in my garden. He was extremely violent, came towards me several times with an open clasp-knife in his hand, and his eyes starting from the sockets with rage—a perfect raving madman. I was fortunately accompanied by my upper servant. He accused me of having opened a letter of his, and said that he had written to the General Post Office about it, and would take proceedings, as it was an indictable offence.' . . . 'I think it right that you should be informed of F.'s (the plaintiff's) violent conduct, as you might unwittingly recommend him without being aware of his temper and faults.' E., who was the superintendent of the Royal Horticultural Society, of which the defendant was a member, was in the habit of recommending gardeners to members of the society; and the plaintiff had, as the defendant knew at the time he wrote the letter, applied to E. to procure him another situation. It was held, the letter could not be considered as a privileged communication, as there were expressions in it which went beyond what could be justified by such a communication. *Quære*—If it would have been privileged had the letter been confined to a simple statement of the servant's conduct?—(*Fryer v. Kinnersley*, 33 L. J., C. P. 96.)

TRUCK ACT.—Butty colliers working in partnership under a verbal contract with the colliery owner, by the day, by the ton, or by the yard, according to the nature of the work; and, though not allowed to underlet the work, employing others to assist them, for whose wages they were responsible, are, according to *Ingram v. Barnes*, not 'artificers' receiving wages within the meaning of the Truck Act. Per Pollock, C. B.: The case is within the Truck Act or not, accord-

ing as the contract is for mere labour, or for the result of labour.—(*Sleeman v. Barrett*, 33 L. J., Ex. 153.)

POOR RATE.—A house appropriated by the visitors to the use of the chaplain of a county lunatic asylum is not within the 16 & 17 Vict. c. 97, s. 35, which enacts, that no lands or buildings purchased for the purposes of a lunatic asylum (with any additional building to be erected thereon) shall, while used for such purposes, be assessed to county, or parochial, or other local rates, at a higher value than that at which the same were assessed at the time of such purchase, as the chaplain, though required by the visitors, was not required by the statute, to be resident; but a residence so appropriated to the medical superintendent is within that enactment, as he is required by section 55 to be 'resident in the asylum;' and a separate house, but conveniently situate near the other buildings, with garden, and reasonable accommodation for a man of his education and position, is assessable only at the lower value.—(*Congreve v. The Overseers of the Township of Upton*, 33 L. J., M. C. 83.)

LEGITIMACY.—The evidence to repel the presumption of legitimacy of a child born during wedlock must be strong, distinct, satisfactory, and conclusive, and such as to produce a judicial conviction that the child was not procreated by the husband. Where, however, a husband and wife lived together for nine years without having a child, and then separated and never lived together again, and a child was born ten years after the separation, while the wife was in the habit of committing adultery with another man, which child was treated by the paramour as his own, and was called by his surname, and brought up by him, the child, notwithstanding possibility of access on the part of the husband, was held to be illegitimate. A mother's evidence is inadmissible to prove the legitimacy or illegitimacy of her child born during wedlock. The report in *Plowes v. Bossey* corrected.—(*Atchley v. Sprigg*, 33 L. J., Ch. 345.)

SUCCESSION DUTY.—H. G., a married woman, domiciled abroad, having exercised by her will a general absolute power of appointment, given to her by the will of her father, over property situate in England, it was held, *per* Lord Justice Turner, that legacy duty was not, but that succession duty was, payable by the appointees; Lord Justice Knight Bruce expressing no further opinion than that one duty or the other (it being immaterial which) was payable. The Succession Duty Act applies to persons wherever domiciled, and the rule '*mobilia sequuntur personam*' cannot, as under the Legacy Duty Acts, be made the ground of an exemption from duty. (*Per* Lord Justice Turner).—(*In re Wallop's Trusts*, and *In re the Trustees Relief Act*, 33 L. J., Ch. 351.)

LEGACY.—Testator having two policies of assurance upon his life for L.1000 each, by his will gave to his wife 'the L.2000 insured on his life.' Subsequently he surrendered one policy. At his death bonuses were due on the other; and it was held his widow was entitled to the L.1000, and also to the bonuses due upon the unsurrendered policy. Testator gave his residuary real and personal estate to his wife for life, and after her decease to his brothers T. and E., 'or their heirs in proportion to the number of children each might have then living, share and share alike.' At the death of the wife both the brothers were dead; and there were then living four children of T. and two of E. It was held the word 'heirs' meant 'children,' and that the residue was divisible in sixths amongst the children living at the death of the wife.—(*Roberts v. Edwards*, 33 L. J., Ch. 369.)

BOTTOMRY.—The master of a ship in need of repairs gave a *respondentia* bond, but took no steps to forward the cargo. The English owner of the cargo chartered another vessel, and the master of this second vessel, having taken the cargo on board and knowing nothing of the bond, proceeded homewards. He was stranded on Scilly, and the cargo taken out and stored, subject to the master's lien. The charterer sent down instructions to the master to proceed with the cargo to Hamburg. Before he could do so the cargo was arrested in

a suit by the bondholder. The master, having insured the ship and freight, obtained a settlement from the underwriters for the freight as upon a total loss. It was held, that the master, who alone by the rules of the Court of Admiralty could appear in a suit of this nature, and the underwriters through him, had a lien upon the cargo for the freight, its non-arrival at its port of destination being caused by the owner and not being attributable to the master. A claim for freight gives the master a possessory lien at common law. The master has at common law a possessory lien on the cargo, not only for freight due, but also for general average. This lien being lost with the possession, as to the general average the Court of Admiralty has no further jurisdiction to enforce a contribution. The lien for freight is regarded in the same light as salvage-service, and consequently, as between the master and a bondholder, takes precedence of an antecedent bond.—(*The Cargo ex The Galam*, 33 L. J., P. C. 97.)

WILL.—Testator duly executed his will, which was written on the first and on part of the second page of a sheet of paper. Beneath the subscriptions of the witnesses there was a clause appointing an executor, and beneath this and also on the third page were several alterations in the disposition of the testator's property, apparently written from time to time. At the end of the whole, and on the third page, testator signed his name in the presence of witnesses who duly subscribed. It was held, the presumption was that testator intended his signature at the end to apply to all that preceded it, and that, as there was nothing to rebut such presumption, the whole was entitled to probate.—(*In the goods of Cattrall*, 33 L. J., Pr. 106.)

CARRIERS.—*Semble*—that a condition in a special contract that the company will not be answerable for the loss, or detention of, or damage to wrappers, or packages of any description charged by the company as 'empties,' is unreasonable. But a condition that the company would not be liable in respect of goods destined for places beyond the limits of the company's railway; and, as respects the company, their responsibility will cease when such goods shall have been delivered over to another carrier in the usual course for further conveyance. Any money which may be received by the company as payment for the conveyance of goods beyond their own limits will be so received only for the convenience of the consignors, and for the purpose of being paid to the other carrier, is reasonable. *Quære*—Whether, without the conditions, the defendants as to forwarding these goods on other lines, were to be considered as having incurred the liabilities of common carriers.—(*Aldridge v. The Great Western Rail. Co.*, 33 L. J., C. P. 161.)

CARRIERS.—The question whether an article is of the description mentioned in the 1st section of the Carriers Act, 1 Will. IV. c. 68, is a question of fact for a jury. Elastic silk webbing, which is a woven fabric composed of one-third silk and two-thirds of india-rubber and cotton, the silk being the most valuable of the materials, and which is called in the trade 'silk web,' as distinguished from cotton web, is within the definition in the act of 'silks wrought up with other materials.'—(*Brunt v. The Midland Rail. Co.*, 33 L. J., Ex. 187.)

CHARTER-PARTY.—By a charter-party made at Liverpool for a voyage from Liverpool to Sydney, the charterer agreed to 'pay for the use and hire of the ship in respect of the said voyage L.1550 in full, on condition of her taking a cargo of not less than 1000 tons of weight and measurement.' It was held, this meant 1000 tons of a cargo of goods in the ordinary proportions of the port of lading, viz., one-third weight and two-thirds measurement, and had not reference to a cargo for the Sydney market, in which the proportion was ordinarily one-third measurement and two-thirds weight.—(*Pust v. Dowie*, 33 L. J., Q. B. 172.)

COPYRIGHT.—Where by the same deed the administrator of the author assigned to plaintiff, after the 5 & 6 Vict. c. 45, the copyright and acting-right in a dramatic piece first published after the 3 & 4 Will. IV. c. 15, plaintiff can maintain an action for penalties under the latter Act against defendant for performing the

piece without his licence, within twenty-eight years of its publication, although the deed has not been registered; as plaintiff's right is under the 3 & 4 Will. IV. c. 15, and there is nothing in the 5 & 6 Vict. c. 45, which renders registration necessary in the case of an assignment of such a right of representation. *Quere*—Whether registration would have been necessary if the piece had been published more than twenty-eight years.—(*Lacy v. Rhys*, 33 L. J., Q. B. 157.)

LANDLORD AND TENANT.—In a lease of a farm the clause—'the tenant to perform each year for the landlord at the rate of one day's team-work with two horses and one proper person for every 1.50 of rent when required (except at hay and corn harvest), without being paid for the same,'—extends to other than agricultural work, such as hauling coals; but it does not oblige the tenant to find a cart, plough, or other vehicle or machine necessary for the performance of the work (Mellor, J., dissenting on the latter point).—(*Duke of Marlborough v. Osborn*, 33 L. J., Q. B. 148.)

NEGLIGENCE.—Contributory negligence by an infant has the same effect in disentitling him to maintain an action as in the case of an adult.—(*Abbott v. Macfie*, and *Hughes v. the same*, 33 L. J., Ex. 177.)

CONTEMPT OF COURT.—Pending a suit, and after the time had expired for defendants to file affidavits, an article appeared in a local newspaper commenting upon the persons who had made affidavits on behalf of defendants, attributing to them falsehood, ignorance, and self-interest, and holding them up to public contempt and ignominy; and it was held, that the article was a contempt of Court, and the publisher of the newspaper was committed to prison. The publisher having made an affidavit, in which he expressed his regret and contrition for having unintentionally committed a contempt of Court, and having undergone ten days' confinement, he was discharged on payment of costs and fees, although he had made no apology to the deponents for the imputations cast on them.—(*Felkin v. Herbert*, 33 L. J., Ch. 294.)

WILL.—A testator bequeathed his residuary real and personal estate to trustees upon trust for his nephew H. B. C. for life, and after his decease, 'providing he shall leave any child or children him surviving, upon trust for such persons, and for such ends and purposes as my nephew shall by his will direct or appoint, give, devise or bequeath the same; but if my nephew shall die without leaving any child or children him surviving, and shall not previous to his decease make any such appointment, gift, or bequest as aforesaid, then upon trust for other persons.' H. B. C., by his will, appointed, or assumed to appoint, the whole real and personal estate mentioned in his uncle's will to trustees upon the trusts declared respecting his own residuary estate. Upon the decease of H. B. C., without leaving any child or children surviving, it was held, that the word *and* could not be read as *or*, but that as the nephew had died without leaving a child, no power had arisen, and therefore no appointment had been made, and consequently that the gift over took effect in favour of the persons named in the uncle's will.—(*Barker v. Young*, 33 L. J., Ch. 279.)

LEGACY.—Testatrix, by her will, after disposing of various portions of her property (other than Spanish bonds), bequeathed 'the remainder of her money in the Spanish bonds' to her nephews and nieces, and stated her intention to be to divide her property equally between her two sisters' children. The bulk of the residue consisted of Spanish bonds; and it was held, the general residue passed under the above bequest; the words 'in the Spanish bonds' being, under the circumstances, descriptive only of the nature of the investment of the bulk of the property comprised in the bequest.—(*Patrick v. Yeatherd*, 33 L. J., Ch. 286.)

LEGACY.—Testator bequeathed his residuary estate 'to the hospitals of London,' and in other parts of his will used the word 'London' in the popular sense, and not as applying to the City; and it was held, that neither the City, nor the old Bills of Mortality, nor the Metropolitan Boroughs, nor the Registrar

General's new district, nor any other defined district, could be adopted as the proper limits for the operation of the bequest, but that the word 'London' must be construed in a popular sense as comprising all houses standing in a continuous line of streets within the cities of London and Westminster and the borough of Southwark; and that in a case of doubt as to any particular hospital, the question as to its right to participate must be decided with reference to its own particular circumstances.—(*Wallace v. the Attorney General*, 33 L. J., Ch. 314.)

LEGACY.—Under a bequest to trustees for 'my four nephews and niece, children of my brother Richard, namely, Robert, Richard, Francis and Margaret Jane,' a fourth nephew (also a son of Richard), Thomas by name, was held not entitled to share.—(*Glanville v. Glanville*, 33 L. J., Ch. 317.)

GOODS SOLD AND DELIVERED.—Whilst a portion only of goods had been delivered by plaintiffs under a contract for the sale and delivery of a larger quantity to be ordered by defendant, on the terms of payment of half in cash and half by bill at six months, defendant, instead of giving any cash or bill, said, 'I now close all further orders,' and it was held plaintiffs might treat the contract as rescinded, and sue on a *quantum meruit* in respect of the goods delivered, although the six months for which the bill was to have run had not expired.—(*Bartholomew v. Markwick*, 33 L. J., C. P. 145.)

MARINE INSURANCE.—A clause in a policy of insurance on a ship,—that 'In case the ship shall by accident or negligence of the master and crew run down or damage any other ship, and the assured shall thereby become liable and pay as damages any sum not exceeding the value of the ship insured and her freight by any judgment of any Court of law or equity, the assurers shall pay such proportion of three-fourths of the sum so paid as the sum assured bears to the value of the ship and her freight,'—does not extend to damages recovered against the shipowner for personal injury caused to persons on board a ship with which the ship assured had come in collision.—(*Taylor v. Dewar*, 33 L. J., Q. B. 141.)

NEGLIGENCE.—In an action brought against the owners of a ship for injury to a telegraphic cable on the high seas, the first count of the declaration stated that plaintiffs were possessed of a cable which was lawfully and with the consent of Her Majesty lying at the bottom of the sea, within three marine miles of the shore and coast of Kent, and that defendants so negligently navigated their ship that an anchor belonging to it struck against and injured plaintiffs' cable. The second count was to the same effect, but stated that the cable, at the time of the injury to it, was lying within eight marine miles of, and more than three marine miles from the sea-shore. It was held, on demurrer, that these counts, though omitting to allege notice on the part of defendants of the existence and situation of the cable, were good. Defendants, in answer to the above-mentioned counts, pleaded that the cable, at the time of the alleged injury to it, was lying at a place beyond the jurisdiction of Her Majesty, and that defendants were aliens, subject to the laws of the kingdom of Sweden, and not to those of England. The pleas went on to state that the injury to the cable was caused by a lawful use of their anchor by defendants in the ordinary course of navigation. It was held, that the introductory part of the pleas, setting up that defendants were foreigners, and not subject to the laws of this country, alleged facts which by themselves afforded no legal answer to the action, and were only matters to be taken into account by the jury in deciding whether defendants had or had not been guilty of negligence, but that the whole plea was good.—(*The Submarine Telegraph Company v. Dickson*, 33 L. J., C. P. 139.)

SHIP AND SHIPPING.—The property in a ship passes, as between the vendor and his assignees and the vendee, by a bill of sale, although the transfer be not registered pursuant to the Merchant Shipping Act, 1854.—(*Stapleton v. Haymen*, 33 L. J., Ex. 170.)

THE

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THE YELVERTON CASE AND THE MARRIAGE LAW OF SCOTLAND.

POPULAR cases, like other questions which enlist the sympathies of the public, are rarely discussed on their merits. A litigant, to gain the smallest share of public notoriety, must be supposed to be either a rogue or a victim. If there is room for both suppositions, his case has a fair chance of becoming a public, and therefore a party question; and the celebrity of the cause will generally bear some proportion to its capabilities for the exhibition of feats of rhetorical legerdemain, in which the characters of the principal parties are exalted or depressed, according to the taste or caprice of the individual. The Yelverton case has become one of the party questions of the day. Miss Longworth—we so designate the lady, in accordance with the tendency of the decision of the House of Lords—is by one party raised to the position of a heroine, and endowed with every conceivable excellence and attraction. Her letters are eloquent and imaginative; her conduct exemplary; her courtship a model for the daughters of England; and her misfortunes the natural result, though one for which she is noways responsible, of confidence reposed in an interesting member of the Satanic school of military officers.

Another class of thinkers, ably represented by the *Saturday Review*, make very light of Lord Westbury's first-class moral and intellectual certificate, and without ceremony degrade Miss Longworth to the rank of an 'adventuress,' ambitious of a titled alliance, and not over-scrupulous as to the means of attaining it. Her punishment, they protest, is too severe for the crime of having

failed to gain the object of her ambition ; but then, want of success is just what society always does unrelentingly punish, and Miss Longworth having placed herself in the category of unsuccessful great people, must submit with a good grace to the consequences. On the whole, they say, there is nothing so extraordinary in her case that we should be tempted to exclaim against man or fate, and still less against the laws of a code which is only too indulgent to ladies in the position of Miss Longworth.

Although, as journalists, we are concerned chiefly with the interests of the law, and very little with the interests of the parties, in the cases which we have occasion to notice, it is impossible, in a case of this importance, to overlook the moral aspects of the question. If Miss Longworth's behaviour in the affair were all that her panegyrists affirm, then, in refusing to accord her the status of a married woman, the law has done her a great injury ; and the interests of society require that the law should be amended ; so that men who, in the eye of religion and of good faith, have contracted marriage, may no longer be in a position to take advantage of the defective state of the law, and by their own fraud to escape from the obligations which they have undertaken. It sounds paradoxical indeed, to suggest that our marriage law stands in need of amendment, in the sense of enabling marriages to be more readily contracted or more easily proved than at present. But if Miss Longworth be an innocent sufferer, there is no escaping this conclusion. Her case, and the case made for her by her supporters in the press and in society, is that she is, morally speaking, married to Major Yelverton, though, owing to the state of the marriage law as administered in the House of Lords, she has been unable to establish the marriage by legal evidence. Either, therefore, Miss Longworth or the law is to blame in the matter. Either she, when she formed the connection with Major Yelverton which was the subject of the litigation, had been too careless of what, in the opinion of English society, distinguishes the position of a mistress from that of a wife, or she has been made the victim of a fraud for which the law affords no redress. Yet, what greater latitude could be given to the plaintiff in a suit to declare a marriage, than that which the law of Scotland allows ? We are afraid it would scarcely do to allow the person bringing the action to prove it by his or her own evidence, else the candidates for matrimonial honours would be more numerous than welcome. We shall afterwards point out the danger that may result from

letting in the evidence of the defender. Yet, short of admitting the evidence of the parties, our law places no restriction upon the mode of proving a marriage.

We concur in the opinion expressed by the Law Lords who took part in the decision of the Yelverton case, that the argument founded on the correspondence and the relations subsisting between the parties prior to the meeting in Scotland, was misdirected. On the determination of the question whether a marriage had or had not been contracted in Scotland, it could have no possible bearing; and for any impression it could produce with respect to the conduct of the parties, their discretion or good faith, it might just as well have been omitted. Our own impression, formed after hearing the able arguments addressed to the judges of the Court of Session, was, that there were no grounds for censure or observation on the conduct of either party up to the time of renewal of intimacy in Edinburgh in February 1857. The intimacy originated in an accidental meeting,—a circumstance not so uncommon in real life as Miss Longworth's censors would have us to suppose. The correspondence arose naturally; its tone, in the earlier letters at least, is graceful and refined; and the transition from friendship to a warmer sentiment is evidently spontaneous, and free from any taint of artifice or design. Indeed, if we except one or two equivocal expressions in the later letters, which we may fairly suppose to have been used with an innocent meaning, our observation may be extended to the whole of the foreign correspondence. We must add that Major Yelverton is nowhere very explicit on the subject of matrimonial 'intentions,' and that the tone of his letters might reasonably have suggested apprehension or even distrust in the breast of a more cautious and less romantic correspondent than Miss Longworth. The word 'marriage' is never mentioned by the Major; and where the subject is alluded to by him, it is difficult to discover, in his answers to her earnest appeals, anything but a desire to avoid committing himself to an engagement, which for unexplained reasons he had resolved not to undertake. Ultimately he seems to have intimated pretty distinctly his wish to break off the intimacy; and judging his conduct by the ordinary standard of opinion in such matters, it cannot be said that the intimacy had gone so far, that he could not, as an honourable man, have taken the course which he did. If Miss Longworth, after the meeting at the Crimea, had refused *him*, society would not have held her blameable; and in rea-

son, and in the opinion of Miss Longworth herself, as expressed in her letters, he was entitled to break off his intimacy with her. That he accepted her suggestion that the intimacy might cease, is the plain meaning of the letter in which he intimates his intention of avoiding a meeting, lest his 'coldness' should offend her. We assume, of course, that the atrocity of a direct refusal to a lady is to be avoided, if possible; and short of that, we do not see how his wishes could have been intimated in plainer or more decided terms.

It is not necessary, in observing upon the recent decision, that we should take any notice of the discreditable statement made by Major Yelverton at the Irish trial, and repeated in his pleadings in the declarator, respecting the alleged improprieties of the parting scene in the Crimea. That Major Yelverton was capable of making the indecent attempt which he described may be believed, since he was guilty of the greater indecency of proclaiming it to the public; but of the truth of the story there is no evidence in the action of declarator; and the most favourable view of the matter for Major Yelverton is, to regard the story as a fabrication,—as the desperate attempt of a ruined man, fighting for position and status, with a charge of bigamy impending over him, and willing to gain his case even at the expense of his reputation and that of the lady whom he had so greatly wronged. This, or something like this, was the explanation suggested by Lord Barcaple, who, in his argument as counsel for Miss Longworth, so remarkable for the tact and fine perception of the strong side of his case which is not the least important qualification of an advocate, maintained that Yelverton's conduct during the courtship was throughout fair and honourable, and that marriage was constantly in view of both parties as the object of their most cherished wishes.

The only result which we can deduce from the voluminous mass of evidence as to the intimacy prior to the meeting in Edinburgh, is, that a courtship begun and carried on by correspondence was terminated in the same way, after some personal communication had taken place in the Crimea, in which Major Yelverton, at no time a very ardent lover, appears to have pleaded pecuniary difficulties as a reason for declining or indefinitely postponing the contemplated marriage. So far, the circumstances may be said to afford a presumption that, if the intimacy were renewed, it would be with a view to marriage. It was broken off because marriage was declined; and if love could be controlled by logic, it should not have

been renewed, except upon the understanding that the objections to a marriage were abandoned. But this consideration does not really contribute much to the solution of the question whether a marriage was afterwards contracted. That Miss Longworth was, in point of station, an eligible companion for Major Yelverton, is also immaterial. Any of the Queen's subjects was equally eligible in the eye of the law. Considerations of disparity of rank would be of no avail to rebut the evidence of matrimonial consent, supposing such evidence to exist; while, on the other hand, congeniality of rank or disposition could add nothing to the weight of evidence which *per se* was insufficient to establish that consent which is essential to the constitution of marriage.

Miss Longworth's case is, that she was legally married by mutual interchange of consent in Edinburgh, without the presence of witnesses or the intervention of writing; and that the religious sanction was afterwards supplied by the celebration of the Roman Catholic ceremony by Father Mooney. It is not quite clear from the evidence, though it appears probable, that she was aware that the Irish ceremony would not be effectual as a civil marriage. Besides the difficulty arising upon the statute invalidating mixed marriages by Catholic priests (of which she was apprised by the question which Mooney put to Major Yelverton before performing the service), it appears that the form of the ceremony was not that appropriate to marriage, but what is called a 'renewal of consent,' used where a Roman Catholic has been already married to a Protestant according to law, and wishes to have the ceremony performed again according to the rites of the Roman Catholic Church. It appears that the bishop was told that they had been married in Scotland, and on that representation gave his consent to the performance of the ceremony, which he would not otherwise have given. Besides, if Miss Longworth had contemplated a legal marriage, why go to Ireland? If a real and not a fictitious marriage were intended, there were Catholic priests in England and Scotland who would have tied the knot in a way that would have been as satisfactory to her conscience as the ceremony at Rostrevor; and in England, a licence would have saved the publicity attending the proclamation of banns. There was, indeed, one rather serious obstacle to a marriage ceremony by a Roman Catholic clergyman in Great Britain. Such a ceremony would have made Miss Longworth Major Yelverton's wife, and it is pretty clear that Major Yelverton would not

have consented to a ceremony which he believed to be legally binding. It is strange that a lady of Miss Longworth's intelligence and knowledge of the world should have been deceived by the Rostrevor marriage; and we are not surprised that so eminent and experienced a judge as Lord Kingsdown should have come to the conclusion that the Irish ceremony was really only a variation upon the proposed meeting at the Cathedral Church, Manchester, which was to be 'merely the same as being present at mass making you a Catholic.' The alleged marriage by reading the service in Edinburgh, without the presence of witnesses or written acknowledgment, is in a social aspect even more absurd than the Irish ceremony. It is very doubtful whether a private verbal acknowledgment makes a marriage according to the law of Scotland, supposing the fact should be proved by the oath of the defender upon a reference. But supposing it were so, is it conceivable that any woman of ordinary intelligence and information would peril her reputation upon an irregular marriage so constituted? Miss Longworth's case is, that she was not satisfied with it until it was fortified by a religious ceremony; but as the ceremony had no legal efficacy, she is driven to rely upon the alleged civil marriage in support of her claim to the status of a wife. It is easy to say that circumstances forced her to be content with a private marriage; but, harsh as the observation may appear, there is the widest difference between a private marriage properly attested, and one which only admits of proof by the oath of a party who may find it convenient to repudiate. A private marriage to a lady in Miss Longworth's position was at best a painful and humiliating substitute for honourable matrimony; but a marriage such as she alleges on the record was one fraught with danger, of which she could not be ignorant, and against which even the laxity of the Scotch marriage law could afford but a very inadequate protection. Instead of offering anything of our own, we prefer to state the conclusion to be drawn from the evidence on this part of the case in the language of Lord Kingsdown, who says (we quote from the report in the *Times* of 29th July): 'The examination, I think, shows that it is in a very high degree improbable that the appellant should either marry the respondent in Scotland, or enter into an engagement to do so. She alleges that during this visit to Scotland he promised again to marry her, and proposed a private marriage, and also actually did marry her; but that she refused to cohabit till there was a religious celebration of the marriage. This appears to

me, having regard to the feelings and opinions of the lady, as they are to be gathered from her letters, utterly incredible. As to the Irish marriage, it is not necessary to suppose that she, or even he, held it to be a mere mockery. But did either of them intend or suppose that it was to be a marriage in law, making them legally husband and wife? I think certainly not. She was a Roman Catholic. She considered that the marriage by a priest of her Church, though not making her, in point of law, a wife, would, in a religious point of view, justify or excuse their cohabitation. She thought that she might become his wife in the eyes of God, though not in the eyes of man. Something was to be done which might satisfy her conscience and leave him free.'

We heartily wish that we had been able to come to a different conclusion from that enunciated in the opinion which we have quoted. It is abundantly plain, that in the first period of the intimacy between the parties, honourable marriage was contemplated by one of the parties, if not by both; and Miss Longworth is entitled to all the sympathy and commiseration which is due to a lady whose beauty, talents, and accomplishments qualified her to occupy a distinguished position in society, but who, having given her heart to a man who was not worthy of her, has been betrayed into a false position by circumstances, the consequences of which she did not, and perhaps could not, foresee. But whatever blame may justly attach to Major Yelverton (and it is not our intention to assume the position of censor towards either party), we do not think he is chargeable with having entrapped her into a fraudulent marriage. Nor do we see how it is possible that such a purpose, if it had been entertained, could well be accomplished, in the present condition of the marriage law of Scotland.

The theory of the Scotch law of marriage would seem to exclude the possibility of deception where there is a *bona fide* intention, on the part of either of the contracting parties, to constitute the marriage relation. The supposition of a mock marriage implies the subsistence of some form or ceremony which may be counterfeited. At the time when the intervention of a clergyman was required by the law of the sister kingdom, there was at least an opening for personation; and marriage by a sham parson, though it may not have actually been attempted in many instances, was a recognised element in the sensation romances of the last generation. Under the existing marriage laws of England and Scotland, fraud is all but impos-

sible, though the means by which it is excluded are widely different. The framers of the English marriage law have aimed at excluding the risk of error or fraud by prescribing one simple, invariable, and unbending form, and requiring the intervention of a public official, the registrar of the district, whose duty it is to see that the legal form is observed. As far as fraud is concerned, the attendance of the registrar is an effectual safeguard; and the risk of error, such as it is, is sufficiently met by provisions indemnifying against the consequences of imperfections in the register for which the contracting parties are not responsible. In Scotland the same object is secured by the disregard of all form, and the provision that marriage may be constituted in any mode which attests the consent of the parties. Not only is the law indifferent to the form of the contract; but, where the contract is to be proved by the written acknowledgments of the parties, it is not even necessary that the evidence in writing should point to any particular time of celebration. This doctrine, which was for the first time unequivocally laid down in the case of *Leslie*, was recognised by the House of Lords in the decision of the Yelverton case; for it was assumed by all the noble and learned lords who took part in the decision, that a marriage would have been established, if the correspondence had been such as to show that the parties recognised each other as husband and wife, although it might not be possible to ascertain the precise period at which the marriage relation had been constituted. If, however, a marriage is to be proved by the evidence of witnesses who have heard the parties acknowledge the relation, that is a marriage constituted by public acknowledgment, and the difficulty as to fixing the date of its commencement does not arise. Farther, it is maintained on behalf of Miss Longworth, and the authorities lend a considerable support to the proposition, that a marriage constituted by consent may be proved by the evidence of the defender on a reference to oath. We rather think that the only reported cases in which such a reference has been allowed, are cases of marriage constituted by promise *subsequente copula*. In cases of alleged consensual marriage, however, the Commissary Court was in use to authorize the judicial examination of the defender upon cause shown, which would in the generality of cases supersede the necessity of a reference to oath. The Evidence Act, which authorizes the examination of the parties in ordinary actions, does not apply to consistorial cases; but as these cases are merely excepted from the operation of the Act,

and are not dealt with in any special way, the old rules as to judicial examinations and references are still operative; and it does not appear that any valid reason exists for excluding the pursuer's right to refer a declarator of marriage, as well as any other action, to the oath of his adversary.

The doubt, to which we have given expression, as to the possibility of establishing a consensual marriage in this way, arises upon the effect of the oath, supposing the defender to depone in terms of the pursuer's allegation. It is easy to figure cases where, in consequence of the loss of evidence, the testimony of one of the parties, under an oath of reference, might be the only available evidence. We may illustrate this by the case of a marriage constituted by acknowledgment before witnesses, where the witnesses had died, and secondary evidence of what they knew could not be obtained. But the case alleged by Miss Longworth is that of a private acknowledgment, no witnesses being present, and no written record being preserved of it. Does the law recognise such a marriage? The question is not one of evidence, but of the constitution of the contract; and, as regards the interests of society, no more important question could be submitted for the adjudication of the Court. It is clear from the cases in the Commissary Court, cited in Mr Fraser's fourth chapter, that the acknowledgment requisite to the constitution of *sponsalia de præsenti* is a public acknowledgment; and though, in the case of marriage constituted by writing, attestation was not required, yet it seems to have been considered that a written acknowledgment not attested was only effectual to the same extent as a holograph deed, and that the date must be proved by extrinsic evidence. The decisions of the last quarter of a century have so thoroughly relaxed the law respecting written acknowledgments, that the distinction we have referred to is either inoperative or of no practical value; and what the House of Lords may affirm with respect to private verbal acknowledgments is a question which, being *sub judice*, we will not attempt to solve, and for the solution of which the most intimate acquaintance with the consistorial law of Scotland would be of little avail. We will only venture to point out one of the consequences which may result from the recognition of the principle involved in Miss Longworth's application for a reference to oath. If it be competent to establish a marriage by the uncorroborated oath of the defender in a declarator, and after the celebration of a second mar-

riage, then any person who wishes to get rid of his wife and to marry another, has only to arrange a suit at the instance of the lady, in which he may make oath that he had been previously married to her by private verbal acknowledgment. Such a case could not possibly be broken down by cross-examination, if it were the fact that the parties had been acquainted at the time, and had the opportunity of contracting. The defender no doubt would render himself liable to a prosecution for bigamy if he remained in this country ; but by going abroad, where his evidence might be taken by commission, even that check would be removed ; and the Court, although morally certain that the story was a fabrication, would be legally obliged to give the name of marriage to an adulterous connection, and to degrade the regularly married wife to the position of a concubine. The circumstances of the present case, evidently, do not admit of the supposition of collusion ; but it is not the less necessary to keep in view the tremendous opening which will be given to collusive actions, if the law of Scotland is elastic enough to allow of a marriage being proved by the uncorroborated oath of a defender.

THE PROFESSIONAL REPORTS ON THE COURT OF SESSION BILL.

THREE months have elapsed since we intimated that the Lord Advocate, after considering the reports of the professional bodies upon the proposed reconstruction of the code of Court of Session procedure, had resolved to introduce a new Bill ; but that, owing to the parliamentary session being so far advanced before he had an opportunity of considering their suggestions, legislation would be deferred to the next session. Most of our readers, at least in Edinburgh and Glasgow, where the subject has obtained a considerable share of the attention of members of the legal profession, have had occasion to consider the subject in relation to the reports which have emanated from the bodies with which they are respectively connected. Few of them probably have had the opportunity of perusing all the reports that have been issued in relation to the Bill ; yet, without a careful collation of the opinions which have been expressed upon the various questions, it is impossible to arrive at a satisfactory estimate of the tendency of professional opinion upon this important subject.

With the view of enabling our readers to ascertain the tendency

of the views which have been expressed upon the subject, we purpose to lay before them such a comparison of the various suggestions that have been made in regard to the more prominent features of the Bill, as may be comprised within the usual limits of an article. It will be found that there is a very considerable diversity of opinion even upon points of first importance,—such as the form of pleading, the order of procedure, and the extent to which it is desirable to encourage trial by jury. We believe it to be quite practicable to frame a measure which, if it does not secure the unqualified approval of any of the parties whose opinions are represented in the reports, may at least obtain the support of the profession as a whole, and be accepted as a substantial improvement upon the existing forms of process. The measure which we understand to be in contemplation will, we believe, conform as far as possible to established forms of process; at the same time engrafting upon these forms provisions intended to secure brevity and precision in pleading, more satisfactory modes of trial and of appellate procedure, and the power of making amendments, which has already been beneficially introduced into the practice of the common law and equity courts in England, as well as our own Sheriff Courts. The subject has now received very full consideration, and the time has arrived when legislation is desirable and practicable. We trust that the Lord Advocate will be prepared at the commencement of the ensuing session to introduce a Bill which he may reasonably expect to carry, and that the profession will give it that united and cheerful support, without which it must be extremely difficult to legislate in reference to such a subject. With these prefatory remarks we shall proceed to our exposition of the views of the legal bodies as contained in the reports of the committees appointed by the Faculty of Advocates, the Societies of the Writers to the Signet and the Solicitors before the Supreme Courts, the Faculty of Procurators in Glasgow, and the Juridical Society.

Pleading and Relative Procedure.

In referring to the report issued by the committee of the Faculty of Advocates, it is necessary to premise that the report has not yet received the approval of the Faculty. We believe, however, that the resolutions of the aggregate committee may be fairly taken to represent the opinions prevalent amongst the practising members

of the bar ; while the reports of the sub-committees, upon whom the duty of examining the measure in detail was devolved, represent, at any rate, the opinions of individual members of considerable standing and influence in the profession ; and in so far as not overruled by the resolutions of the aggregate committee, these reports would in all probability be adopted by the Faculty. The sub-committee who reported upon the sections of the Bill relating to pleading and initiatory procedure, were divided in opinion as to the propriety of attempting any radical change in the forms of pleading. A majority of the sub-committee state, that they view with the gravest apprehension the consequences of introducing a system of pleading, which is not only entirely new to those who are to practise it, but which also is to be extended to a class of actions to which it has never been applied in England. Referring to the proposed form of pleading, based on that of the common law courts, they entertain the greatest doubt whether such a system can ever be applied to cases in which equitable pleas are raised, or whether equity jurisprudence can ever be safely administered without some detail of the facts and circumstances, on which appeal is made to the equitable jurisdiction of the Court. If it is attempted to confine the proposed forms of pleading to special cases or actions, they do not see how these cases or actions can be sufficiently defined, and they conceive that an attempt to classify actions could not but lead to great confusion. In actions on contract, or where merely legal pleas are raised, the present system, they think, admits of pleadings as short, as distinct, and leading as directly to issues, as the common law procedure itself. In actions of a more complicated nature, or in actions which are maintained in equity, the present system enables the parties to give a detailed statement of the case ; and, in such cases, detail is often absolutely necessary, in order that the case may be stated. Another section of the committee express their opinion, that the present system of pleading in the Court of Session has failed, that it is the constant source of litigation, and is productive of great expense, delay, and vexation to the suitors. They think the time has now come for effecting some radical change ; and finding that another system has succeeded in England, under circumstances noways peculiar and exceptional, it seems only a prudent step to take as much from the English procedure as might be reasonably expected to work well in the Scottish courts. The sub-committee further recommend, with the

object of shortening records, that either party should be entitled to require his adversary to furnish him with a note of particulars, and also, if necessary, to answer on oath any paper of questions which might be put to him.

On considering this part of the report, the aggregate committee were also divided in opinion. A large minority were favourable to the introduction of a form of pleading by successive papers, on the basis of the English common law system. Some were opposed to any material change. Ultimately a resolution was passed recommending that the leading provisions of the Bill intended to secure brevity, precision, and despatch in pleading, and to give the power of amending records, should be embodied in a Bill and passed into law.

The views of the Society of Writers to the Signet on the subject of the forms of pleading may be collected from the following summary, which we take in a slightly abridged form from the report of their committee. With regard to the provisions of the Bill regulating the contents of the pleadings, they observe that these, while obviating the defects of the existing system, err in the opposite direction, and substitute a mode of pleading so very summary as in some cases to be almost impracticable. These provisions would, in their opinion, enable the parties to frame their pleadings in such general terms, as, while complying with the requirements of the Bill, completely to conceal their line of evidence, and thus place their adversary at a disadvantage. In cases involving questions of both fact and law, they believe that the proposed mode of pleading by setting forth the facts simply in the terms in which a judgment is desired, would be found utterly unworkable. As an improvement upon the existing system of pleading, they suggest an enactment in the following terms:—‘That the pursuer shall set forth, in a condescendence to be annexed to the summons, as concisely as may be, in one or more articles, the material averments which form the ground of action, each article consisting as nearly as may be of a separate and distinct averment.’ The provision of the Bill, that each statement of the cause of action shall be so framed as to be complete in itself, without reference to any other article, is in their opinion objectionable, as leading to unnecessary repetition. Under the present system, too much is allowed to be put into one article; and accordingly, the committee propose that each article should consist of a separate and distinct averment, requiring a direct and unambiguous answer.

They approve of the proposed clauses for excluding unnecessary matter, and also of the provisions of the Bill relating to the subsequent steps of pleading by replication and rejoinder; but to avoid misleading comparisons with the English pleadings of the same name, they suggest that the pleadings subsequent to condescendence and defences should be designated 'Answers and Replies.'

The report of the Society of Solicitors upon this point is very brief; and, if we rightly apprehend its import, the form of pleading which they recommend is not materially different from that recommended by the Writers to the Signet. They are not agreed that it is necessary and desirable to have pleas in law, and they approve of the proposed exclusion of detail, matter of evidence, and quotations from documents. In their opinion, the defences should articulately answer the condescendence, and contain a separate statement where, but only where, the defender has a separate case to set up in answer to the action. A revisal of the condescendence should be permitted, subject to rules for preventing unnecessary expense; and if the pursuer requires to answer the defender's separate case, he should do so by adding to his paper articulate answers to the defender's statement.

The Glasgow Faculty of Procurators, while agreeing with the other professional bodies, that the mode of pleading, or of making up a record, ought to be simplified, do not share in the doubts expressed by the latter, as to the possibility of stating any ground of action in the form of a short declaration. It has been found, they say, in the working of the Sheriff Court Act of 1853, that every kind of action competent to the Sheriff may be stated in a short form. The value of this fact is enhanced, when it is kept in view that, as the grounds of action must by that Act be stated only in the *conclusions*, the experiment so successfully made was not begun and has not been carried out with a form of summons quite free from objection on technical grounds. They recommend that the summons should contain within it (not annexed to it) a statement of the grounds and the claim. While approving of the proposal to confine the statement of the pursuer's case to the proposition on which the claim rests, they think that the object in view may be best attained by annexing to the Act a series of forms applicable to the various descriptions of actions, and declaring that such forms should be held to imply the various averments which in law are required to support the proposition on which the pursuer's claim is based. With respect to subsequent pleadings, the Glasgow committee approve generally

of the provisions of the Bill, but are of opinion that a still further simplification might be effected. If the summons were made to contain a statement of the ground of action,—in other words, to be in the form of the Sheriff Court summons,—no condescendence would be required ; and, except in cases where a special defence was set up requiring to be answered, the whole pleadings would be summons and defences.

The report of the Juridical Society, like that of the Faculty, consists of detailed reports from sub-committees to whom the consideration of the clauses of the Bill were referred, accompanied by prefatory resolutions upon the more important points embraced in the measure. The sub-committee had recommended the introduction of a system of pleading by replication and rejoinder, substantially such as that proposed in the Bill; and a large minority of the aggregate committee were prepared to concur in the recommendation, provided the new system were limited to actions which are, in form or in substance, petitory actions. The resolution adopted by the committee, and approved at a meeting of the society, was to the effect, that the evils connected with our present system of pleading are not such as to require the introduction of an entirely new system, and that the introduction of a system of pleading adopted from a foreign and peculiarly technical system of law, would be attended with such risks as should not be encountered. On the other hand, they express this opinion, that very stringent measures should be passed for enforcing the strictest conduct of our present system of pleading, as amended by Lord Rutherford's Court of Session Act, having special reference to various defects proposed to be remedied by clauses in the Bill approved of by the sub-committee on the first two parts of the Bill.

On the whole, we collect from the views expressed in the various reports which we have cited, that the professional committees who have examined the Bill are averse to any such change in the system of pleading as would carry with it the necessity of introducing corresponding change in the subsequent conduct of the action. All are more or less favourable to the provisions intended to secure precision and brevity in pleading; and there appears also to be a general concurrence of opinion in favour of the proposed abolition of revisal, and the substitution, where necessary, of separate supplementary papers in answer to the pleadings of the opposite party. The proposal to mark the various grounds of action and defence by

distinctive words or numbers, has not received the support which we had anticipated. Yet we cannot help thinking that some such provision is essential to sound pleading, more especially if effect is to be given to the general condemnation of pleas in law. At present the pleas serve to indicate the main lines of argument of the parties, the particulars of which are supplied by their respective statements of facts. If the pleas are to be abolished, it will be absolutely necessary to introduce some sort of method into the condescendence and defences, otherwise it will be quite impossible for the judge to ascertain the propositions which he is desired to affirm or disallow.

One or two other points connected with the formal stages of procedure may now be more briefly noticed. As to the form of the summons or initial writ of process, the greatest diversity of opinion seems to have prevailed. The Faculty of Advocates, as represented by their committee, are favourable to the introduction of the short writ of the common law procedure having appending to it, when necessary, a prayer for specific relief. The Writers to the Signet and the Juridical Society see no reason for making any substantial alteration in the existing form of the summons, but recommend the abridgment or omission of the will; thus reducing the summons to the form of a citation to the defender to appear and answer to certain demands there set forth. The Glasgow committee naturally recommend the form, or something like the form, which has been successfully used in the Sheriff Courts. Although we do not admire the Sheriff Court style of summons, it must be admitted that the awkwardness of embodying the ground of demand in the conclusions of the writ is compensated by its tendency to enforce the observance of the requisites of brevity and distinctness. The ground of action in a Sheriff Court summons is most usually introduced in a sort of parenthesis; and the tendency to amplification is controlled by the difficulty of torturing the English language into such involutions of indirect phraseology as would be requisite for the introduction of a very lengthy narration into the precatory part of a summons. The chief objection to this form of summons is, that the averments constituting the ground of action do not admit of being so precisely and distinctly answered by the defender, as in the case of averments embodied in an annexed condescendence. On the whole, we are disposed to think that the Court of Session form of summons is preferable to that

of the Sheriff Courts; and that, if directed to the defender, and docked of the unmeaning jargon, supposed to be addressed to messengers-at-arms in the will, no valid objection could be stated to its form.

The provisions of the Bill of 1862, with respect to actions involving peculiarities in the form of pleading, appear to have been generally approved of. As an example, we may refer to the observations in the reports with reference to pleading in actions of multiplepoinding, and the provisions for stating questions between several parties in the form of a special case. There is no class of actions in which the existing forms of pleading are more liable to abuse than in actions of multiplepoinding. Three opportunities of revising and amending the claims are allowed in regular course to each claimant; and when, as often happens, there is a large number of persons interested in the estate, the delay is interminable, and the expense of making up a record most oppressive.

In concluding this part of the subject, we may add that all the professional bodies have reported in favour of giving the judge the most ample control over records, for all purposes of amendment; and that no objections have been stated to the clauses providing for the admission of new parties to actions, thereby obviating a class of dilatory pleas of very frequent occurrence in practice.

Jury Trial and Proof.

In distributing the subject of the Court of Session Bill amongst the different sub-committees, the subject of proof, including trial by jury, has, from its intrinsic importance, as well as from the material bearing which it has upon the whole course of contentious procedure, been considered sufficient to occupy the attention of a separate sub-committee. The sub-committee, to whom this part of the subject was remitted by the Faculty of Advocates, appears to have gone into the whole matter very thoroughly. Although their conclusions, which are adverse to the continuance of jury trial as a mode of investigating questions of fact in civil causes, have not been implicitly adopted by the aggregate committee, there can be no doubt that their opinions have had considerable weight with that body, and that they represent an impression which is gaining ground within and without the profession. Adverting to the fact that, dur-

ing the year immediately preceding the publication of their report, the number of causes set down for trial was only 69, of which 25 only were tried, the sub-committee observe that the statistics of jury trial prove that litigants will not submit to have their cases tried by jury. They will submit to ruinous compromises rather than face such a tribunal. And it is well known that very many cases never appear in court at all, merely because a right otherwise well founded can be vindicated only through the medium of jury trial. In many other cases, the parties, in order to avoid such a trial, voluntarily concur in having the proof taken on commission,—a most unsatisfactory, dilatory, and expensive mode of investigation. For all purposes of practical legislation, the fact that people will not come to the Court of Session to have their cases tried by jury is, as the committee think, sufficient to justify a change; and as there is no hope of public opinion turning in favour of jury trial, and as its continued retention can only tend to weaken the confidence of the public in the administration of the law, the sub-committee have no hesitation in expressing their opinion that the time has arrived for superseding it by a better system. Although still tolerated in the English Common Law Courts, where custom has reconciled the public to this as to other anomalies, and accustomed jurymen to understand that their function is to register the decree of the presiding judge, and to shield him from responsibility, the English public have steadily resisted the introduction of this mode of trial into other branches of the judicatory. The services of a jury are not much in requisition in the Court of Matrimonial Causes; while in the Court of Chancery the enactments introducing a jury trial are treated with contempt, only eleven equity cases having been tried by jury during the five years that the Act has been in operation.

We cordially concur in the observations which the sub-committee of the Faculty have made, upon the folly of sending, or attempting to send, to the cognizance of a jury cases involving equitable considerations, which are utterly unfit for the determination of an unskilled tribunal, and which are never sent to a jury in England. It is the more surprising that the judges of the Court of Session should sanction the disposal of equity cases by jury trial, in the face of the warning with which the Lord Chief Commissioner Adam concludes his treatise, and which, if attended to, might have restricted the evils of this mode of trial, and saved it from

some of the obloquy under which it has fallen. 'Cases of equity,' he observes, 'should be confined to a tribunal which does not act by the intervention of a jury, for that judicial body has not faculties to collate, to compare, and to weigh the nice distinctions according to which equity is understood to dispense justice; and if it had those faculties, it has not time to apply to them the repeated attention and consideration which equity in its nature exacts. The principles of equity, well understood and correctly administered, must be secured from injury, and the only risk they run is by being thrown injudiciously into the jurisdiction of a jury court. Those judges, therefore, who have a power to dispose of causes, by sending them to a jury, or keeping them within the pale of judicature, belonging to the Court of Session, should examine them with great care, and exercise all their faculties of discrimination to avoid such consequences.' He further adds, 'If cases of pure equity, to which a jury is not competent, are sent to trial by jury, it is calculated to overwhelm the system, by exhibiting an incapacity to perform the office of distributive justice in a correct and satisfactory manner.'

The result at which the committee of the Faculty of Advocates has arrived is, that without attempting entirely to abolish jury trial, which might provoke opposition on the part of the public, a serious effort should be made to restrict the actions of juries to their legitimate sphere of usefulness; that is to say, to the determination of cases involving direct and simple issues of fact, resembling in their nature, and in the kind of evidence by which they are instructed, the issues of criminal prosecutions, with which juries are admittedly qualified to deal. In this category are included most of those grounds of action which infer both civil and criminal consequences; such as cases of injury to person, property, or reputation, issues of libel, and on policies of insurance where the defence resolves on a charge of fraud, and the like. With respect to other actions involving disputed questions of fact, the committee recommend that cases should be tried by the judge upon the record itself, without the assistance of a jury, and with the assistance of a short-hand writer. The substance of the committee's recommendation is embodied in the following excerpt from the report of our resumé of the deliverance of the

re :—

should be the judge in the first instance; and that his judg-

ment, given with reasons, should be subject to review by the Inner House, upon the notes, their judgment being final as regards the facts. The committee recommend two exceptions to this suggestion—1st, They think that there ought to be an appeal to the House of Lords upon the facts as well as law, in any case where the interest at stake is of the value of L.1000; 2dly, They think that in all consistorial actions (as defined by the Conjugal Rights Act) an appeal upon the facts as well as the law should be competent against the final judgment of the Court.

'The committee deem it essential to the proper administration of justice, that no judge should be allowed to give judgment, without being obliged to state in open Court the grounds on which he proceeds.

'The proposal to have the evidence recorded by a short-hand writer, is recommended upon two grounds—1st, It relieves the judge from irksome labour, gives him an opportunity of watching the witness, and leaves his mind undistracted to consider the bearing of the evidence as it is led; 2dly, It will save the very great expense which is now caused from jury trials extending over several days. The cause of this is not the length of counsels' speeches, nor the great number of witnesses examined, but the time wasted in waiting till the answers of the witness have been recorded by the judge.'

It is satisfactory to find, so far as we can discover from the reports, that the most perfect unanimity prevails throughout the professional bodies who are so deeply interested in the question. Instead, therefore, of repeating the arguments which, with slight variations, will be found to be advanced and strongly enforced in all the reports, it may be sufficient to state the results at which these bodies have arrived in their own language. The committee of the Writers to the Signet say: 'That any attempt to appropriate distinct classes of actions to jury trial by reference either to their conclusions or to their nature, except certain kind of actions of damages, is inexpedient. . . . Your committee, indeed, are of opinion that jury trial in civil cases should, instead of being extended, as proposed by the Bill, be very much limited. They believe that they express the general opinion of the country, when they say that jury trial in civil cases has, after the experience of half a century, proved a complete failure, chiefly in consequence of the ruinous expense and uncertainty attending it. . . . The adjustment of an issue for trial before a jury is generally but the signal for an immediate compromise of a case—often at a great sacrifice of just rights' (p. 68). On the subject of trials without a jury they observe (p. 74): 'As your committee interpret clause 135, it proposes to give power to either party in a case where proof is required, but which is not to be tried before a jury, to demand that the proof be taken before a Lord Ordinary; and if this be a correct interpretation of the meaning and effect of the clause, the proposal meets with the cordial approval of your committee.'

The Solicitors' report expresses the conviction of that body that

a strong feeling prevails in Scotland, both among the profession and the general public, that the system of jury trial for civil cases is defective, and frequently does not secure justice to the parties, and is ruinously expensive. The principle, they say, upon which the Act of 1850 proceeded, was that facilities should be afforded for avoiding jury trial in all actions, except actions of libel or for nuisance, and action of damages (p. 7). As a substitute for it, they approve of the proposal to allow a short-hand writer in all cases in which evidence is taken before the Lord Ordinary; and they consider that, if the Outer House procedure were put upon a better footing, and with the aid of a short-hand writer, the proof ought in all cases, except where witnesses cannot be brought to Edinburgh, to be taken continuously, and at a peremptory diet, before the Lord Ordinary.

The Glasgow Faculty of Procurators are of opinion (Report, p. 17) that, excepting Exchequer cases and actions of libel or slander (the peculiar nature of which may justify the intervention of a jury), jury trial should only be allowed in civil cases where all the parties agree or consent to such a mode of trying the questions between them. They approve of the suggestion that the proof should be taken before the judge himself, and refer in support of their opinion to the satisfactory working of that mode of trial in consistorial practice, and in the practice of the Sheriff Courts. On these grounds they recommend—

‘1st, That, with the exceptions before referred to, trial by jury should only take place when both parties agree to that mode of trial;

‘2d, That proof by commission should only be resorted to of consent, except in the special cases referred to; and

‘3d, That, on the motion of either party, the proof should be taken by the Lord Ordinary in the manner proposed in the Bill.’

The Juridical Society, without expressing any decided opinion as to the extent to which it is desirable to confine the operation of jury trial, approve generally of the proposed mode of trial before the Lord Ordinary without a jury—his judgment being subject to review, as provided in the clauses of the Bill.

Before leaving this subject, we may observe that the reports indicate a very general, if not a unanimous, approval of the improvements proposed to be engrafted upon the existing system of jury trial, assuming that that system is for certain purposes to be retained. Among the suggested improvements are included a power to the judge to state questions to the jury, and to direct a verdict to be recorded in conformity with the answers to be returned to those

questions; the power of amending the issue or record at the trial; and the power of taking a verdict subject to the opinion of the Court upon points reserved, or of directing a special case. These amendments, which are mainly borrowed from the Common Law Procedure Act, together with the proposed simplification of bills of exception, will tend very materially to reduce the expense of jury cases in the stages of procedure subsequent to the trial, and will, in the majority of cases, enable the parties to obtain the benefit of a judgment of the Court upon points of law, without subjecting them to the costly and absurd formality of a new trial. Upon these points there is indeed no room for difference of opinion, and upon them the committees have not thought it necessary to do more than to express their opinion generally in their favour, and to suggest some additional provisions, among which we notice a suggestion for raising the qualification of jurors, with the view of providing a more intelligent and impartial body of judges for the trial of jury causes.

Appellate Procedure.

Under this category we include the review of decrees of the inferior courts by the Court of Session, the review of the Lord Ordinary's judgment by the Inner House, and appeals to the House of Lords. This portion of the Court of Session Bill has been so favourably received by the profession, that a detailed exposition of the views of the legal bodies regarding it, as expressed in the reports, would be little more than a recapitulation of the leading clauses, with the verdict of the various committees ratifying their provisions. As our readers have already been made acquainted with the nature of the proposed changes through the medium of these pages, we should not be justified at present in travelling over the ground again. We hope, however, to be in a position, before the commencement of the Parliamentary session, to state the substance of the provisions of the measure which will in all probability be submitted to the Legislature; and in doing so we shall have an opportunity of pointing out how far its provisions are based upon those which have already obtained the approval of the professional committees.

NOTES ON THE LEGISLATION OF THE YEAR.

THE RAILWAYS ACTS.

A VERY important advance has been made this year towards the object which we advocated in a recent article—the liberation of railway enterprise from the drag which is placed upon its extension, in the shape of Parliamentary expenses, and the relief of Members of Parliament from one of the most burdensome of their duties, the investigation of the merits of the applications addressed to them by railway companies. It would be premature at this time to speculate as to the results of the arrangements embodied in the new standing orders, by which the only mode of taking evidence, in the first instance, is transferred to a Parliamentary commission, nominated by the Speaker of the House of Commons. By the Acts which received the royal assent on the last day of the Parliamentary session, Parliament will be relieved altogether of a large part of the railway business which annually comes before it; and as, from their position in the statute-book, these Acts will not appear in our impression for a month or two, it may be convenient to give some account of their leading provisions, in anticipation of the reprint. The Acts in question form Chapters 120 and 121 of this year. The first of these is entitled,—

An Act to facilitate in certain Cases the obtaining of further Powers by Railway Companies.—(Cap. 120.)

The preamble states that it is expedient that in certain cases railway companies should be enabled to obtain further powers on complying with the conditions of a general Act of Parliament, without being obliged to procure in each case a special Act; and after the usual interpretation clause (which we do not require to notice), it is provided by Section 3, that the Act shall take effect and apply,—
'(1.) Where a railway company are desirous that authority should be given to themselves and some other railway company or companies to enter into an agreement with respect to all or any of the matters following; namely, the maintenance and management of the railways of the companies respectively, or of any one or more of them, or of any part thereof respectively; the use and working of the railways or railway, or of any part thereof, and the conveyance of traffic thereon; the fixing, collecting, and apportionment of the tolls, rates, charges, receipts, and revenues levied, taken, or arising

in respect of traffic; the joint ownership, maintenance, management, and use of a station or other work, or the separate ownership, maintenance, management, and use of several parts of a station or other work: (2.) Where a railway company are desirous of obtaining an extension of the time limited for the sale by them of superfluous lands: (3.) Where a railway company incorporated by special Act, or by certificate under the Railways Construction Facilities Act, 1864, are desirous of obtaining authority to raise additional capital.' The mode of procedure is by an application to the Board of Trade under the provisions of the general Act for a certificate, after public advertisement and intimation. As soon as conveniently may be after the time for completion of the required notice, the Board of Trade is to proceed to inquire whether the company have complied with the requirements of the general rules respecting notice; and before settling a draft of the certificate, the Board is to take into consideration any representation made to them, and to inquire into the merits of any objection brought before them respecting the application.

By Section 7 an opportunity is afforded to any railway or canal company to object to the proposed grant of powers. It will be observed that the right of the public to oppose applications is not necessary, an omission which will naturally be viewed with some alarm by the mercantile community. The clause runs, 'If in any case any railway or canal company desire to be heard by counsel, agents, and witnesses, against the application of the promoters, and (within such time as is prescribed by general rules under this Act) lodge at the office of the Board of Trade a notice in writing to that effect (herein-after referred to as a notice of opposition) in the form set forth in the schedule to this Act (with such variations as circumstances require), in that case the Board of Trade, if the railway or canal company lodging the notice would be affected in any way by the proposed certificate, shall not proceed on the application of the promoters.' If the Board of Trade do not proceed on the application, they must without delay lay before both Houses of Parliament a copy of the draft certificate lodged by the promoters and of the notice of opposition; and the promoters shall be at liberty to apply for the desired powers by way of bill, in the same session of Parliament.

Sections 9-12 provide for the settlement of a certificate by the Board of Trade, in conformity with the schedule annexed to the

Act; and the Board is further empowered (subject always to the provisions of the Act, and having regard to the provisions of any special Act relating to any company empowered by a certificate) to insert in the certificate such provisions as they, according to the circumstances of the case, shall deem necessary or proper for better effectuating the purposes of the certificate.

By Sections 12–16 the Board of Trade is directed to lay the draft certificate settled by them before both Houses of Parliament within seven days after the same is settled, if Parliament is then sitting, or if not, then within seven days after the next meeting of Parliament, not being later in any year than the first day of June. If either House of Parliament, within six weeks after the draft of a certificate settled by the Board of Trade is laid before that House, resolves that the certificate ought not to be made, the same shall not be further proceeded with; but if neither House of Parliament within the period mentioned thinks fit to resolve that the certificate ought not to be made, then as soon as the period of six weeks has expired, the Board of Trade may make and issue a certificate in conformity with the draft, which shall then be published in one or more of the *Gazettes*.

Sections 17–23 declare the effects consequent on the issue of a certificate, the chief of which are (§ 20), that ‘there shall be incorporated with the certificate (which shall for this purpose be deemed the special Act), in the first-mentioned case, Part III. of the Railways Clauses Act, 1863; and in the thirdly-mentioned case, the Companies Clauses Acts;’ but subject to this restriction (§ 22), that ‘it shall not be lawful for any company empowered by a certificate under this Act to issue any share created under the authority of the certificate, nor shall any such share vest in the person accepting the same, unless and until a sum not being less than one-fifth part of the amount of such share is paid up in respect thereof;’ and subject also to restrictions upon the powers of borrowing, and the application of the borrowed money, similar to those which Parliament has been in use to insert in special Acts, by which borrowing powers are conferred.

Section 24 provides that nothing contained in the ‘Act shall make it obligatory on the Board of Trade to settle a draft of a certificate in any case if it appears to the Board of Trade for any reason that the application for a certificate should not be complied with.’

Section 25 reserves the power to Parliament to regulate the audit of the accounts of railway companies, passed before or after the issuing of the certificate, and the revision and alteration of the maximum tolls and charges allowed to be taken in respect of that railway; and Section 26 provides that 'a certificate may be made under this Act and the Railways Construction Facilities Act, 1864, jointly, and in any such case the forms of certificate given in this Act and the said Act may be adapted to the circumstances of the case.'

Some miscellaneous provisions, including a provision for the correction of errors in certificates, and others of less importance, complete this important and useful enactment. A schedule of forms of procedure is subjoined, which are to be operative until altered by the Board of Trade.

An Act to facilitate in certain Cases the obtaining of Powers for the Construction of Railways.—(Cap. 121.)

The other statute which forms part of the subject of this notice, relates to the making of branch and other lines of railway, and deviations of existing railways, and of railways in course of construction, and also the execution of new works connected with or for the purposes of existing railways. The preamble recites that 'the object aforesaid would be promoted if, where all landowners and other parties beneficially interested are consenting to the making of a railway or the execution of a work, the persons desirous of making or executing the same were enabled to obtain power to do so, on complying with the conditions of a general Act of Parliament, without being obliged to procure a special Act.'

Sections 3–5 relate to contracts for the acquisition of land, and enact in substance, that (§ 3) where promoters of a railway intend to apply for authority to make the railway, they and all parties seised or possessed of or entitled to lands required for the railway shall have all such powers and capacities as, in order to the purchase or taking and sale of lands required for an undertaking authorized by a special Act of Parliament, are conferred by the Lands Clauses Acts on the promoters of the undertaking so authorized, and on parties so seised or possessed; subject to the following restrictions and provisions:—

(1.) Nothing contained in the Act shall confer on the promoters and parties aforesaid any of the powers or capacities conferred by the part of the Lands Clauses Acts with respect to the purchase

and taking of lands otherwise than by agreement, or with respect to the entry upon lands by the promoters of the undertaking, or the determination or ascertainment of the amount of any purchase or compensation money, or the settlement of any apportionment or other matter, otherwise than by agreement (except the provisions for enfranchisement of copyholds): (2.) Any party under disability or incapacity, and not having power to sell and convey or release any lands, except under the Lands Clauses Acts, as applied by the present section, shall have capacity only to contract with the promoters for the sale of those lands, and shall not (before the certificate comes into operation) have capacity to carry the contract into execution: (3.) The promoters (before such certificate comes into operation) shall be empowered only to contract for lands, and shall not have capacity to take or hold lands.

Facilities are then given (§§ 4 and 5) for the acquisition of Crown lands, and with respect to entry upon, or interference with, roads and highways.

Sections 6-22 relate to the mode of obtaining a certificate from the Board of Trade, and the effect of the certificate when obtained. The provisions are similar to those of the Act already noticed, the most important variation being in section 22, which provides, that 'if the company, or persons by the certificate empowered to make the railway, do not within five years from the commencement of the operation of the certificate, or within any shorter period prescribed therein, complete the railway and open it for public traffic, then (subject to any provisions and qualifications in the certificate contained) all the powers and authorities given by the certificate shall, from and after the expiration of the time aforesaid, cease, except as to so much of the railway as is then completed.'

Section 23 declares that 'the Lands Clauses Acts shall be incorporated with the certificate (which shall for this purpose be deemed the special Act), except as may be therein excepted, and except as to the following provisions; namely,—

'(1.) With respect to the purchase and taking of lands otherwise than by agreement: (2.) With respect to the entry upon lands by the promoters of the undertaking: (3.) So much of those Acts as provides for the determination or ascertainment of the amount of any purchase or compensation money, or the settlement of any apportionment or other matter, otherwise than by agreement (but excluding from this exception so much of those Acts as provides for

the determination of the amount of compensation to be paid for enfranchisement of copyholds).’

Sections 24–30 provide for the incorporation of the company, if consisting of seven or more persons. If the number is less than seven, a certificate of incorporation may be obtained if desired; and in every such case, the Companies Clauses Acts shall be incorporated with the certificate (which shall be deemed the special Act); but ‘it shall not be lawful for any company empowered by a certificate under this Act to issue any share created under the authority of the certificate, nor shall any such share vest in the person accepting the same, unless and until a sum not being less than one fifth part of the amount of such share is paid up in respect thereof.’

Section 29 imposes restrictions upon the borrowing powers of companies obtaining a certificate entitling them to borrow money, and as to the application of the money borrowed, analogous to those which are contained in the previous Act; and, by Section 30, ‘contracts relative to the purchase or taking of lands for the railway, entered into by the promoters before the incorporation of the company by the certificate, shall be as binding on the company as if they had been entered into by the company.’

The construction and completion of the railway form the subject of Sections 31–48. The leading enactment (§ 31) provides, that ‘the Railways Clauses Acts shall be incorporated with the certificate (which shall be deemed the special Act), except as may be therein excepted, and except as to the following provisions, namely,—(1.) Such of the provisions with respect to the construction of the railway and the works connected therewith as relate to the correction of errors and omissions in plans, or to plans and sections of alterations: (2.) With respect to the temporary occupation of lands near the railway during the construction thereof: (3.) With respect to leasing the railway. And subject to the following provisions, namely,—(1.) Nothing herein shall confer power for the taking or using of lands for deviation or for any other purpose, otherwise than by agreement: (2.) Any provision referring to the datum line described in the section approved of by Parliament shall be read as referring to the datum line described in the section approved of by the Board of Trade.’ Alterations on the plans and sections (§ 32) can only be made with consent of the Board of Trade, who are also required (§ 34), before granting a certificate, to see that the usual conditions as to deposit of capital, etc., have been complied with.

Sections 35–40 provide for the application of the deposit-fund; and by Section 41, ‘if the company, or persons empowered by the certificate to make the railway, do not, within the time in the certificate prescribed, and if none is prescribed, then within five years from the commencement of the operation of the certificate, do one or other of the following things, namely,—(1) complete the railway and open it for public traffic; or (2) give (being a company) such proof as herein-before mentioned respecting their capital and expenditure; or (3) execute and deliver such a bond as is herein-before described,—then and in every such case the deposit fund shall, from and after the expiration of the time aforesaid, be forfeited to Her Majesty, and shall accordingly be paid, transferred, or delivered out to or for the account of Her Majesty’s Exchequer, and form part of the consolidated fund of the United Kingdom.’

‘Where a certificate (§ 48) is obtained by a previously existing company possessed of a railway open for public traffic, then, if the company fail to complete the railway and open it for public traffic within the time in the certificate prescribed, and if none is prescribed, then within five years from the commencement of the operation of the certificate, the company shall be liable to a penalty of not less than twenty pounds and not exceeding fifty pounds for every day during which such failure continues, except only in respect of any time during which it appears from a certificate of the Board of Trade that the company were prevented from completing the railway or opening it for public traffic by unforeseen accident or circumstances beyond their control, but the want of sufficient funds shall not be deemed a circumstance beyond their control, within the meaning of this provision.’

The tolls and charges are regulated by a schedule which is referred to in Sections 49, 50.

Section 51 makes applicable to any line made under its authority, the General Railway Acts, subject to the following variations:—

(1.) The railway shall be deemed to be a railway made and constructed and carried on under the authority of Parliament and under the powers and provisions of an Act of Parliament, and the certificate (taken in conjunction with this Act) shall be equivalent to a special Act of Parliament: (2.) Certain enactments which refer to time shall respectively be read and have effect as referring to the time of the commencement of the operation of the certificate: (3.) The terms ‘Company’ and ‘Railway Company’ include persons:

(4.) Such of those enactments as refer to the directors, etc., shall extend and apply to the persons (not being a company) empowered to make the railway : (5.) Enactments which refer to a writing under the common seal of the company shall be similarly extended : (6.) Such of those enactments as impose any penalty or forfeiture, or any pecuniary liability, or any obligation on a company, or give any right, remedy, or process against a company, are similarly extended : (7.) The amount of any compensation to be made to the owners and occupiers of any lands for loss or injury or inconvenience sustained by them respectively by reason of any works done under the authority of any of those enactments shall, in case of dispute, be settled in manner directed by the Lands Clauses Acts and the Railways Clauses Acts as respectively applicable to the case : (8.) Such of those enactments as provide for the case of the Board of Trade certifying that the public safety requires additional land to be taken by a company for the purpose of giving increased width to the embankments or inclination to the slopes of the railway, or for making approaches to bridges or archways, etc., shall be read and have effect, as regards such portions of land as are mentioned in any certificate so given by the Board of Trade, as if compulsory powers of purchasing and taking lands had been contained in the certificate.

The only other clauses which call for special notice are Sections 56 and 57. Where the certificate (§ 56) is obtained by a previously existing company incorporated by special Act or by certificate, the certificate may authorize the company to raise, as capital, for the purposes of the certificate, such additional sum of money as therein limited, by the issue of new shares or new stock, either ordinary or preference, or partly ordinary and partly preference, or partly in that mode and partly by borrowing on mortgage, at the option of the company, or as may be prescribed in the certificate, and with power to create and issue debenture stock. The Companies Clauses Acts shall be incorporated with the certificate ; and the restrictions by this Act imposed, with respect to the exercise of their borrowing power and to the application of money, shall apply. Where the certificate (§ 57) is obtained by a previously existing company incorporated by special Act or by certificate, it shall be the duty of the Board of Trade not to settle a draft of the certificate without being satisfied that the members of the company have approved of the application to the Board of Trade.

Legal Intelligence.

APPEAL IN THE HOUSE OF LORDS.

YELVERTON v. LONGWORTH OR YELVERTON.—*July 28.*

It is impossible, within the usual limits of our reports, to offer even an outline of the circumstances, as disclosed in the evidence of this celebrated case. It may be convenient, however, to state the propositions maintained by the parties, and which were alleged to be established by the voluminous documentary evidence adduced. There were two actions before the Courts in relation to the matter; the first being an action for putting to silence, at the instance of Major the Hon. Charles William Yelverton, younger son of Lord Avonmore, an Irish peer, against Maria Theresa Longworth, an English lady, but who was resident in Scotland at the time of the alleged marriage; the second being a declarator of marriage at the instance of Miss Longworth.

The conclusions of the declarator were founded upon allegations (1) of a marriage by the interchange in Scotland of *de presenti* matrimonial consent, which was alleged to have taken place at the pursuer's lodgings in St Vincent Street, Edinburgh, on 12th April 1857, by solemn declaration and reading of the marriage service of the Church of England; (2) of *ex post facto* declarations and acknowledgments by the parties that they were husband and wife; (3) of promise of marriage *subsequente copula*; (4) of a marriage performed on 15th August 1857, in the Roman Catholic chapel at Rostrevor, in Ireland, by a priest of that persuasion. This ground was not insisted in before the Court of Session, and was formally abandoned in the House of Lords; (5) of cohabitation, and habit and repute. This last ground was also abandoned, or not insisted in.

Major Yelverton denied that he had ever promised to marry the pursuer, and that they had interchanged mutual matrimonial consent in Scotland. He alleged that the connection between them was irregular, and that it had been formed in Scotland before the Irish marriage, illicit intercourse having taken place both before and after the Irish ceremony—a ceremony which was not marriage, in which the pursuer represented that she alone was interested, and that, although it would leave him free, it would satisfy her conscience. With respect to the ceremony at Rostrevor, he founded upon an Act of the Irish Parliament (19 Geo. II. c. 13), according to which, a marriage celebrated by a Roman Catholic priest is void, if either of the parties at the time, or at any time within twelve months, have declared himself or herself to be a Protestant.

The discussion, both in the Court of Session and in the House of Lords, was confined to the question of the alleged constitution of a marriage—1st, by promise *subsequente copula*; and 2d, by *de presenti* consent. The Judges of the First Division of the Court of Session were divided in opinion, the Lord President holding that the alleged marriage was not proved, while a majority of the Court, consisting of Lord Curriehill and Lord Deas, held that it was.

The case was argued at great length in the House of Lords, and to-

day judgment was delivered, reversing the judgment of the Court of Session, decerning in the action of putting to silence, and assailing the defender in the declarator of marriage. Lords Wensleydale, Chelmsford, and Kingsdown, were of opinion that there was no evidence of a marriage constituted in Scotland *per verba de presenti*, or by written acknowledgment; and that there was no evidence of a promise of marriage made in writing in Scotland to support an action of declarator on the subsequent cohabitation of the parties. The Lord Chancellor, who delivered the leading opinion, dissented. His Lordship was of opinion that there was evidence of a marriage by *de presenti* engagement, and *a fortiori* of *sponsalia de futuro*, which, followed by *copula*, made a marriage. We understand that Miss Longworth has lodged a minute of reference to the defender's oath.

English Cases.

CONTRACT.—A. B. being requested by C. D. (in consequence of reports that he was paying improper attentions to a daughter of the latter) to discontinue visiting at his house, in order to lay C. D. under obligation to him, and so, by obtaining permission to continue his intercourse with C. D.'s family, to gain free access to the daughter, whom he had, in fact, secretly seduced, advanced to C. D. a sum of money on mortgage. Upon bill by A. B. to foreclose, and by C. D. to set aside the deed, it was held by the M. R., that, notwithstanding the pecuniary consideration, the immoral purpose vitiated the whole deed; and a decree was made for its cancellation, leaving A. B. to sue at law, if he thought fit, for the money lent.—(*Willyams v. Bullmore*, and *Bullmore v. Willyams*, 33 L. J., Ch. 461.)

DOMICIL.—Upon a claim, on the part of the Crown, for payment of legacy duty, treating testator as domiciled in England, it appeared that testator (whose name was English, but whose place of birth was unknown) had held a commission in the English army, but had sold out in 1810, and retired to France, where he resided until his death in 1820, placing an illegitimate son at a French school. His will, made in 1819, was in the English form. He left property in the French funds, and none in England. It was held by the M. R., upon the foregoing facts, that the presumption was against an English domicile, and that, in the absence of proof by the Crown of English domicile, legacy duty was not payable.—(*The President of the United States v. Drummond*, 33 L. J., Ch. 501.)

LANDS CLAUSES ACT.—A landowner, part of whose house, within the meaning of section 92 of the Lands Clauses Act, is taken by a railway company, cannot, under that section, compel the company to take any portion, beyond what it requires, less than the whole (*per* Turner, L.J., *semble*, agreeing with the Master of the Rolls). A field, separated from the garden of a house by a ha-ha, traversed by a gravel walk leading to a coachman's house at the further end thereof, and used occasionally for purposes of pleasure (as archery and dancing), though chiefly as pasture for cows, was held, by Turner, L.J. (*dubitante* Knight Bruce, L.J.), not to be part of the house within section 92 of the Lands Clauses Act. The 92d section of the Lands Clauses Act is applicable, although the landowner may have only a leasehold interest—*semble*.—(*Pulling v. The London, Chatham and Dover Rail. Co.*, 33 L. J., Ch. 505.)

THE JOURNAL OF JURISPRUDENCE.

ON THE INVESTIGATION OF CRIME IN SCOTLAND.

It has been remarked, that 'happy are those who learn wisdom at the peril of another.' If it is a happiness to a country to have acquired the inestimable privilege of individual freedom by the experience of others, the people of Scotland may well be deemed fortunate. It is curious that while, in their struggles for ecclesiastical independence, no people have been more persevering than the people of Scotland, yet the more elementary possession of personal freedom has been little appreciated, and has been earned, not by our own exertions, but simply by contact with the institutions of the sister country. The truth is, that the period of our union with England found our institutions in a much ruder stage of development than those of the sister country. It would have been premature to think of the liberty of the subject at a period when the efforts of all well-disposed persons were required to support the authority of the Crown against its rivals; and when the House of Stuart succeeded to the richer inheritance of the English crown, the Scotch people welcomed the accession to the influence and strength of their Sovereign, while the English jealously watched against encroachments on their already dear possession of personal liberty and self-government. The contest which secured for ever the liberty of the subject was fought out in England; the result acquiesced in in Scotland. The Act of 1701, c. 6, secured in a modified form the liberty of the subject in Scotland against the undue exercise of State authority; and the union of the kingdoms completed the safeguards to that liberty, by making the Crown

officials in this country responsible to a Parliament which remembers Hampden, and the Long Parliament, and the English Habeas Corpus Act. Were it not for this responsibility, the Act of 1701 itself would afford little security against undue interference with personal liberty on the part of the Crown authorities, either in times of public excitement, or in the case of persons of small consideration and humble circumstances. Even under the statute of 1701, any person may be imprisoned for 100 days on a criminal charge supported by information *not necessarily obtained upon oath*: and in the case of the prisoner not being possessed of from two to three pounds to defray the expense of 'running his letters,' he may upon such information be kept in prison for a time to which statute or fixed law assign no limit, and which in actual practice often amounts to seven months. That such a system has been able to exist so long without exciting scandal, only shows the extremely great influence of that responsibility to Parliament and the public opinion of the United Kingdom, which we have indicated as the real existing safeguard to our liberties.

It is perhaps questionable, however, whether the possession of personal freedom thus secured is of equal value to our countrymen, as if it had been worked out by our own efforts. And it is not the least disadvantage of our having obtained the benefit so cheap, that neither the nature of the security we possess, nor the degree of its imperfection, is at all fully appreciated by popular opinion in this country. To a person only acquainted with the *public* criminal procedure of this country, the consideration shown to the prisoner, and the means allowed for his defence, might easily produce the impression that our jealousy of the rights of the subject, innocent or guilty, exceeded that possessed by our neighbours across the border. But this elaborate parade of fair play at the trial, though it may satisfy a lover of justice, cannot to a lover of liberty make up for the arbitrary nature of the proceedings antecedent to the trial. And to appreciate the spirit of a country's criminal procedure, we must not only look at the conduct of the final trial, but we must scan with equal care those proceedings by which the person of the offender is secured, and the preliminary investigations conducted. And if anything were needed to justify our remark, that personal liberty is a possession little appreciated in Scotland, it will be found in the fact, that not one person in ten in this country knows how these proceedings are conducted, or is aware of the nature and

grounds of the warrant upon which the suspected person is committed to prison to await his trial. The popular impression is that the *Fiscal* is autocratic in such matters ; and the popular impression is not far wrong, though such is not the theory of the law.

We are not aware of any statute which regulates the proceedings in criminal matters, up to the period of the prisoner's being fully committed for custody in order to trial, at which step of procedure the provisions of the Act 1701, c. 6, come into play. There have been, at different times, statutory enactments imposing the duty of investigating crimes upon various parties, and giving regulations for their procedure (see Hume, vol. i., pp. 23-26) ; but the functions of these officials successively became obsolete, and the duty of investigating crimes and securing the offenders for trial, came gradually to be performed almost entirely by the Sheriff, to whose office these duties have always pertained at common law. The procedure of the Sheriff in these matters is therefore entirely customary ; and his powers have never been authoritatively defined, either by the Legislature or by the order of a Superior Court. It is worth while here to call to mind the procedure that was adopted with reference to the business of the Circuits of 1709, and the instructions issued by the Court of Justiciary on that occasion. 'The course of inquiry,' we read in Hume, 'was as follows: By the naming of thirty clerks-depute, called the *Porteous Clerks*, or clerks of dittay, who were to travel into the several counties of the kingdom ; and by the issuing of precepts to the several Sheriffs, which enjoined them to cause summon a competent number of fit and habile persons, to appear before these clerks, at the several head burghs, there to be examined as of old, and give information upon oath, concerning such crimes of which they had cause of knowledge. In this way, the several charges were returned into the hands of the Clerk of Justiciary towards the composition of the *Porteous Roll* and Indictments, by the lawyers for the Crown.' In the intimations issued by the Court of Justiciary to their clerks for the performance of their duty, there is one article to this effect—'Item, that none be present with the clerk at the examination of the persons cited by the Sheriff to give up dittay.' (From the instructions of 4th March 1709, Hume, vol. i., p. 25, note, and p. 82, note.) Now there are two points in the practice here referred to, which are worthy of remark, as compared with modern practice. First, that the persons cited by the Sheriff to be examined before the Justiciary clerks

were to *give their information upon oath*. This wholesome provision is usually *without* its parallel in the modern practice. Secondly, the provision that the examinations are to be conducted in private, is only too rigidly adhered to in the modern procedure before the Sheriff. And from the note somewhat carelessly appended by Hume (see quotation, p. 478, *infra*), the reader might infer that the privacy of these examinations as now conducted, is warranted by the authority of the above instructions. Since, however, the modern practice does not in other points adhere to these instructions, it is clear that they cannot be held as an authority for the course of procedure before the Sheriff; and, besides, the Sheriff has never been under the authority of the Court of Justiciary in such wise as to render it competent for that Court to issue such instructions to him. The procedure before the Sheriff in these matters is therefore founded upon usage, and upon usage alone. There is no authority for the Sheriff to grant warrant of committal upon information not given upon oath, except the fact that Sheriffs have long been in the habit of granting such warrants; and there is no authority for the practice of secluding the prisoner and his friends from the examination of the witnesses, except the fact that such a custom has been long allowed to prevail.

The theory, then, of the modern procedure is, that the whole examinations, until the prisoner is committed for custody in order to trial, are conducted under the authority of the Sheriff or other magistrate, according to principles regulated entirely by usage and not by any statute. We shall consider shortly what these principles are, and then look a little further into the method in which they are carried out in the actual course of ordinary practice.

A person suspected of a crime may be arrested by a constable, either immediately in certain emergencies which may be thought to justify such a proceeding, or upon the warrant of a magistrate, which in Scotland is good though not proceeding on the oath of the informer. In either case the constable must bring the prisoner, with all convenient speed, before a magistrate, to be dealt with according to law. The first duty of the magistrate is to conduct the examination of the prisoner. And with regard to the proper method of conducting this important proceeding, we shall quote the authority of Hume (vol. ii., p. 80) :—

‘In conducting the examination of the prisoner, it is the duty of the magistrate to take care, that the man is in the due situation of

mind for so serious a task ; neither affected with liquor, nor disordered in intellect, nor under the influence of threats, or of promises or persuasion, employed to induce him to confess. For, as we shall afterwards see, his confession on this occasion is so far only a circumstance of evidence against him on his trial, as it is emitted soberly, and of his own free will ; and nothing can follow in the way of punishment or severity against him, as for a contempt, though he decline to make any answer at all. On all those matters, it is the business also of the magistrate duly to inform the prisoner ; who may not always know, or may sometimes be afraid to assert his privilege : Moreover, he ought to be warned, that his declaration may, and probably will be made use of against him, on his trial. To be of any material service to the prosecutor on that occasion, the prisoner's declaration must be taken down at large, in writing ; and it must be read over to the prisoner ; and be signed by him and the magistrate, or, if he cannot or will not sign, by the magistrate, instead of him : The whole in presence of creditable witnesses, who have heard and seen the examination, from first to last (not the subscription only of the magistrate and prisoner) ; and who in testimony thereof put their names to the writing, that, if necessary on the trial, they may be able to authenticate it, and swear to all that passed on the occasion.'

The next step in the proceedings is the precognition, on which subject we shall continue to quote from Hume :—

'The next article of the Magistrate's office, unless he see cause immediately to release the prisoner, is to commence an inquiry, or precognition as it is called, concerning the grounds of suspicion against him, by taking the declarations of such persons, as have cause of knowledge respecting the charge. This, for the double purpose of doing speedy justice to the prisoner, if it shall appear that there are no sufficient grounds to detain him ; and of accurately informing the prosecutor, in the opposite event, concerning the whole particulars of the fact, so as he may lay his charge with fulness and precision. With this view, if the witnesses are not attending, so as to be examined without delay, it is lawful for the magistrate to commit the prisoner to gaol, there to remain for further examination, or until a precognition be taken. And against a warrant of this form, he is not entitled to his relief by bail, as a matter of right, though in cases of petty crime he is often indulged with it ; for in terms of the Act 1701, c. 6, that merely applies only to a

settled state of imprisonment,—that which is “for custody in order to trial,”—and not to this temporary detention, while, as yet, it is uncertain whether there shall be occasion for any trial, or whether the charge can be considered as having attached to the prisoner. . . .

‘The course for compelling the witnesses to appear, is by warrant of citation under the hand of the Judge; which he may equally give of his own motion, or on the application of the private, or public accuser. In case of their refusal, or contumacious failure to attend, this order may be followed with second diligence, as it is called, or warrant to apprehend the persons in default, and bring them before the Judge, to be examined. If they obstinately refuse to answer, they may in like manner be coerced with imprisonment, till they comply. Nay more, though it is not the ordinary course of proceeding, yet still, in those cases where, owing to popular favour towards the prisoner, or toward the offence, the truth cannot otherwise be obtained, it is lawful, and has often been practised, *to put the witnesses on their oath*; which if they refuse, they are, for this contempt also, liable to be imprisoned. To guard against the risk of any concert among them, for or against the prisoner, their declarations are taken separately; and if they be taken otherwise, this, according to some judgments (at least unless a sufficient excuse can be assigned), shall be the ground of an exception to the testimony of those witnesses on the trial. To obviate also any danger of improper practices with them, on the part of the accused or his friends, neither he nor any one for him need be admitted to those proceedings;¹ nor can he demand, as of right, a copy, or a perusal even of the declarations. And though the magistrate may and certainly will attend to his suggestions in that respect, as little can he insist, at this period, for a diligence to cite witnesses, or recover writings, on his behalf.’

We have quoted at length this account of a precognition from the highest authority in our criminal law, to show that the theory of the proceeding, as conceived by that great writer, is, in some points, in striking contrast with the actual course of ordinary practice. It is impossible to read the above passage of Hume, without being aware that a criminal precognition, as conceived of in our law, is a judicial proceeding conducted under the eye of the Sheriff or other magis-

¹ ‘It was one of the directions given by the Court for the taking up of dittay, 4th March 1709; “*Item*, that none be present with the clerk, at the examination of the persons cited by the Sheriff to give up dittay.”’

trate, and forms the ground upon which the subsequent warrant of committal is issued. To a person only conversant with the ordinary course of practice, it might be supposed that a precognition is a private inquiry by the Fiscal, on whose report the warrant of the Sheriff is obtained as a matter of course.

Let us consider for a moment what the ordinary course of practice is; and in doing so, we can of course speak only of what is generally done, observing that the details of the practice may vary in different localities according to the views which the Sheriff or the Fiscal of the particular district may take of their several duties and responsibilities. And, first of all, it may as well be stated here that the conduct of the proceedings has now, throughout the country districts at least, fallen into the hands of the Sheriff; and that the preliminary investigations in graver matters are scarcely ever conducted before Justices of the Peace, though in theory these are equally competent in such matters with the Sheriff himself.

The prisoner is apprehended, and carried *sometimes*, not directly to the Sheriff, but to the *lieutenant of police*, when a court of inquiry is held, modelled after the procedure of the Sheriff's office, consisting of the *lieutenant*, the *constable*, and in cases where his assistance has been called in, the *police surgeon*. An instance of this kind of proceeding will be seen in the case of Alexander Milne (High Court, 4 Irvine, p. 311); and under the circumstances of the case, the result was allowed to be given in evidence at the trial. The circumstances certainly were peculiar. It must be remembered that, in that case, the evidence was not seriously objected to on the part of the defence, since it happened that the answers elicited by the questioning were rather favourable than otherwise to the prisoner's plea of insanity. In the speech to the jury, however, on the part of the prisoner, occasion was taken to animadvert upon the propriety of the proceeding,—an observation which was very properly answered by the presiding judge pointing to the fact that advantage had been really taken of it in the defence. The terms of the charge upon that occasion, however, contain a superfluous and we cannot but think unfortunate eulogium upon the conduct of the police; and if a similar case should occur in which an objection is insisted in on the evidence of such a proceeding being offered, the admission of the evidence would certainly require most serious reconsideration. Such a proceeding, allowed in every case where there is reason to suppose that there may be insanity, would simply lead to a systematic

worrying, by men in small authority, of the class of prisoners who, above all others, require the protection of a magistrate's presence. The practice, however, of holding this small court of investigation is not uncommon; and to such an extent is the mimicry of the proceedings in the Sheriff's office carried, that we have heard a lieutenant of police gravely state, that on such an occasion he had *warned* the prisoner,—meaning, we suppose, that he had given the caution customarily administered by the magistrate.

We are willing to suppose that the proceeding above described is exceptional, and that the prisoner is usually, without intermediate worry, carried before the magistrate. At this point, or rather from the moment of apprehension until the prisoner is fully committed for trial (which is commonly eight days, and may often be a fortnight or three weeks subsequently), the prisoner is denied all access to friends or advisers, and comes into contact with no one but those in authority, great or small. If the magistrate be one fully impressed with the nature of his duties, he will, of course, in the examination that follows, act strictly up to the directions above quoted from Hume. It requires, however, often some persistency on the part of the magistrate to keep within bounds the natural or rather the professional anxiety of the Fiscal to elicit from the prisoner as much as he can; and if there should be a district in which the Fiscal has obtained a little the upper hand with his Sheriff, in such a district we may say good-bye to the protection which the prisoner actually receives from the presence of the magistrate. If the accused, in his declaration, makes a full avowal of the charge, and this is corroborated by the report of the officers of police present, the Sheriff at once grants a warrant fully committing him for trial; otherwise he is remanded to custody for further examination, and the precognition of the witnesses is gone into. If we were to take the account in Hume, we should suppose that the witnesses were cited by the Sheriff before himself, and that he was present at the taking of their depositions, in order to exercise his judgment upon the propriety of granting the warrant of committal for trial. This is sometimes done in cases of extreme gravity, but it is by no means the usual course of procedure. The Fiscal drives away with his clerk to the locality of the offence, and there, in some public-house or other place convenient, privately takes down the statements of the witnesses, which he reports to the Sheriff, who thereupon grants, if he think fit, the warrant of commitment for trial. Even when the Sheriff is present

at the taking of the depositions, it is only in peculiar circumstances that the witnesses are put upon oath. When the prisoner is once fully committed for trial, he is, in accordance with the Act 1701, c. 6, served with a copy of the warrant; he is now allowed access to his friends, to prepare for his defence, and the proceedings are transmitted to the *authorities* in the Crown Office, who decide upon whether and when he is to be brought to trial. It is scarcely too much, however, to say that, throughout a large portion of our criminal practice, the intervention of the magistrate in the initial proceedings is reduced to a mere form, and that the release or imprisonment of the accused, until such time as the authorities shall decide as to his trial, is in the hands of the police and the Procurator-fiscal.

We have no hesitation in saying that this is a state of matters that is not satisfactory. We have said nothing but what is perfectly well known to every one in this country who has taken the trouble to inform himself upon these matters. We have said enough to excite in any Englishman who may read this article, considerable amazement that such a system of procedure should exist within a portion of the island of Great Britain. A few years ago, when a regiment of English Militia were quartered in Edinburgh Castle, some of the men were taken up for a squabble in which they were engaged, and we were not surprised at the astonishment expressed by their officers at a system which debarred them from all access to these men while in confinement. 'The kingdom of Naples was nothing to it!' But what most excites the amazement of an English magistrate is, that the accused is committed upon the statements of witnesses not examined upon oath, *and not confronted with him*. Some attention has recently been attracted to the subject in England, by a series of letters published in the *Times*, and signed by 'A Scottish Magistrate;' and though we are not prepared to indorse the suggestions made in those letters with regard to civil procedure, we most fully agree with the writer in thinking that, in criminal investigation, it is time that this 'hole-and-corner system of proceeding' should be done away with. Proceedings which carry with them the grave consequences of imprisonment under suspicion of a crime, are not matters of light importance, and should be conducted with the highest regard to decorum and public satisfaction. In order to put the proceedings upon a satisfactory footing,

we shall suggest the improvements which we think essential. Some of them, if not all, are in the hands of Scottish magistrates themselves, if they choose to incur the responsibility and odium of innovators ; but it is not, of course, to be expected that the whole system throughout the country would be reformed without the pressure of some statutory enactment.

We think, then, in the first place, that the theory of *judicial investigation*, which belongs to these preliminary proceedings, should be fully restored to its place in practice. No warrant of committal should be granted except after examination of the witnesses on oath, in presence of the magistrate who grants it. This is the first step, and so much of course is in the power of any magistrate who should choose to adhere to the practice. Next, we think that the *prisoner* should be present at these examinations, and that in ordinary cases the public should be admitted, care being taken, if thought necessary, that each witness should be secluded until his deposition is taken. This system, we are inclined to think, would be also in the power of a bold magistrate to introduce ; at least we know of no authority which has any right to interfere with his so regulating the proceedings of his own court if he think fit. Lastly, we think the prisoner should be allowed access to his friends, should not be examined until after the depositions of the witnesses are taken, should be allowed to cross-examine the witnesses, and then to make his own statement and call witnesses, or to reserve his defence, as he is advised or thinks fit. He should also be entitled to get a copy of the depositions. The introduction of such a change as this in the order of proceedings could scarcely be accomplished without the concurrence of the Legislature ; the duty of the magistrate at once to take the declaration of the prisoner being peremptory, by authority and usage.

It might perhaps, at first, lead to considerable expense, to require that all the examinations should take place before the magistrate ; but even if the proposed system were more expensive, we are inclined to think that public money would be well spent in carrying it out. The public procedure before the magistrate in England has long performed a useful office in the moral education of the English people. It is not only that the public nature of the proceedings in the sister country awakens a general sense of individual responsibility and duty incumbent on every one to aid in the detection of crime, which is very much lulled to sleep by the system being carried on privately ; but the inevitable curiosity of the community is, in the

one case, rationally satisfied by the publication of the actual depositions of the witnesses, in the other case it is morbidly excited by garbled statements obtained at the door of the Sheriff's office, and served up with such embellishments as are likely to suit the fancy of the readers. People that remember the excitement that was worked up in Glasgow in this way in the case of Jessie M'Lauchlan, will agree that the subject we are discussing is one that may at any time assume the aspect of a serious question. It is quite impossible that an excitement of that nature could have been worked up to such a pitch, had there been before the public from first to last the actual depositions of the witnesses taken upon oath.

Were the precognition¹ in criminal matters made public, and truly judicial, we think our system for investigating crime would be able to bear favourable comparison with any in the world. The office of the public prosecutor and the machinery of the Crown Office would remain unimpaired, and their usefulness would be brought into all the stronger light. We shall be met by the remark, that the changes we propose will give the prisoner too great an advantage. This cannot apply to the innocent. Anything that gives an innocent man an advantage towards clearing himself, must be hailed as an improvement in the furtherance of justice. Does it then apply to the guilty? If so, it must be by giving them the opportunity of concocting a plausible though false defence. Whether this be so, we appeal to the experience of English Courts. Whatever opportunity there may be for the prisoner to concoct a story, we see there amply compensated by the jury refusing to entertain groundless plausibilities. If a Scotch jury is sometimes taken in by a groundless plausible defence, it is because they take into account the fact that the prisoner has been denied all knowledge of the case to be made against him, whereby the defence has been enabled to assume a false air of plausibility. We do not know that there is anything in the national character which would render a Scotch jury more liable to be duped than an English one, or more afraid of declaring their honest conviction in spite of consequences. Or if there be anything in the character which is often assigned to our countrymen, of excessive caution, or rather want of moral courage, we shall again take

¹ We speak of precognition here as the investigation preparatory to committal to custody in order to trial. Nothing in what we have proposed would prevent any further private investigation which the authorities in the Crown Office might, in any special circumstances, wish to be made previous to indictment.

the liberty of remarking that the procedure of the inferior criminal tribunals has no light influence upon the national character itself. And the tendency of that influence—the mysterious power secretly pursuing the offender—secretly investigating his guilt—is certainly not favourable to the development of moral courage. Popular ideas of Divine government itself are educated and modified by the forms of human authority most familiar to the popular experience. And if to the English vulgar the Divine Justice is figured by the image of the Magistrate, assuredly the conception of a Nemesis in the minds of the Scotch vulgar is not altogether unassociated with the mystery of those secret tribunals we have described.

R. C.

REVISION OF THE STATUTE LAW.

THE proverbial slowness of Government departments has received its crowning illustration in the proceedings of the various Royal Commissions for the consolidation and revision of the Statute Law. The proceedings of these bodies also afford evidence of the fact, that the amount of work to be got out of public officials is in the inverse proportion of their pay. The old Statute Law Commission contrived to absorb about L.70,000 of public money, and did nothing. The last Commission, which was subsidized upon a less munificent but still liberal scale, produced the Criminal Law Consolidation Acts. Since then, the work of statute law revision has been entrusted to four junior barristers, working under the direction of the Lord Chancellor, and remunerated by fees for the business performed; and their labours are before the public in the shape of the Register of the Public Statutes from 1800; the Index to the Statutes—Public, Local and Personal, and Private—for the same period; and the two Statute Law Revision Acts of 1861 and 1863. Still the public has great reason to complain of the tardy pace at which the consolidators are moving. The Act of 1861 embraced the period from 1761 to its date, and professed to accomplish the repeal of all obsolete statutes between these two points of time. The Act of 1863 began at the other end of the statute-book, and brought down the expurgatory list from Magna Charta to 1685. There remained then an interval of about seventy-five years to be written up; and that interval, which corresponds nearly to the period intervening between the Revolution and the accession of

George III., was by no means fruitful in legislation. The profession, who had waited ten years for an expurgated edition of the statutes, had a right to expect that, before the close of the last session of Parliament, a supplementary Act would have been ready, applicable to the period in question; and that the present Parliament, barren as it has been of legislative honours, would have been in a position to offer to the public, for the first time in the history of the empire, an authoritative impression of the laws actually in force at the time. Why this should not have been already done, we are at a loss to understand. We are quite alive to the importance of having work of this kind well done; but we doubt the expediency of seeking microscopic accuracy at the expense of indefinite delay. For practical purposes, the standard quarto edition of the statutes might have been assumed to be correct at the time of publication; and the consolidators would then only have required to look over the Acts printed at length, for the purpose of selecting those which had been impliedly repealed, or which had fallen into abeyance, since the publication of that edition. Any Act of Parliament which the editors had omitted might safely have been scheduled as an Act which had 'ceased to be in force otherwise than by express and specific repeal;' because Acts which are not contained in the standard editions are unknown, and being unknown, no harm could result from their wholesale repeal. Indeed, we do not think that absolute certainty on such a subject is attainable; and, therefore, although the consolidators should chance to repeal a few statutes which, though obsolete, had still a spark of vitality in them, or to leave a few unrepealed which ought to have been gathered to the 'tomb of all the Capulets,' the work of revision would not be one whit the worse, provided the object in view were substantially attained. What the public want is an edition in six or eight volumes of the statutes actually in use, with a parliamentary imprimatur. The Queen's printers, or any of the leading law publishers, would have produced a draft as good as the Lord Chancellor's in two years; and the profession, if we are not mistaken, desire that an end should be put to the dilettanti system of consolidation now in operation.

Meanwhile, it may not be amiss to direct the attention of our readers to the contents of the last instalment of the expurgatory Acts to which we have referred; and the specimen which we shall produce of the antiquarian recreations in which the authors of that piece of legislative dandyism have indulged, will give the reader

some insight into the causes of the delay in the progress of Statute Law consolidation.

It forms the 125th chapter of the 26 and 27 of the Queen, and bears date 28th July 1863, and has the very expressive title, 'An Act for promoting the Revision of the Statute Law, by repealing certain Enactments which have ceased to be in force, or have become unnecessary.'

A Royal Commission to consolidate the Statute Law was first issued in 1853, consisting of a Chief Commissioner with a salary of L.1000, and four Sub-Commissioners with L.600 each per annum. The Commissioners made several reports. In 1856, a committee of the Law Reform Society reported that the Commission had even at that time cost the country L.70,000, without producing any fruits of their labours. It was stated that the statute-book then consisted of 40 ponderous volumes, each volume on an average containing about 1000 closely printed pages. The public general Acts were estimated at 17,000, of which 10,500 were obsolete. Besides these, there were 10,000 local and personal Acts, and 1400 private Acts; in addition, 1500 Acts related exclusively to Scotland, Ireland, or the Colonies.

Ultimately, as we have stated, the work was taken out of the hands of the Commission, and entrusted to compilers under the supervision of the Lord Chancellor.

The repealing enactment is very brief, consisting of but one leading section; but the schedule annexed extends to *fifty-seven* pages of the folio edition of the statutes.

It is well known that there exists a radical distinction between the constitutional principles of England and Scotland in respect to the endurance of statutes. In the former, an Act of Parliament once made law remains so until repealed by the same authority as that which enacted it. In Scotland, as the Estates or Parliament were held only to be the representatives of the nation, their Acts fell by desuetude or appearing useless by the people. Lord Stair thus expresses the distinction: 'In the next place are our statutes or Acts of Parliament, which in this are inferior to our ancient law, that they are liable to desuetude, which never encroaches on the other. In this we differ from the English, where Statutes of Parliament, of whatever antiquity, remain ever in force until they be repealed, which occasions to them many sad debates (public and private) upon old forgotten statutes.' Whilst a few questions have

arisen in Scotland whether a statute is in existence or not, in England a statute has been allowed to slumber for many long years, until dragged to light and life on some unseen emergency. In order to clear the way for a codification or systematic arrangement of existing statutes, the Royal Commissioners have obtained the passing of this statute, nullifying a multitude of statutes from the time of Henry III. down to the reign of James II. Thus the entanglements of the forest are cleared from the legislative field before it is occupied by the new plantation.

The preamble of the Act sets forth its object in these words:—‘Whereas, with a view to the revision of the statute law, and particularly to the preparation of a revised edition of the statutes, it is expedient that certain enactments (mentioned in the schedule to this Act) which have ceased to be in force otherwise than by express and specific repeal, or have, by lapse of time and change of circumstances, become unnecessary, should be expressly and specifically repealed.’

There does here appear to be some ambiguity. There are two classes of statutes here set forth: first, those which have ‘*ceased to be in force*,’ and second, those which have ‘*become unnecessary*.’ As to the first class, it is not very obvious how statutes which have *ceased to be in force* can or need to be repealed. It will be seen that many of the enumerated Acts must of necessity have ceased, the persons to whom they applied having been gathered to their fathers many ages ago.

The leading clause enacts that all ‘the enactments described in the schedule are repealed.’ But follows this most strange provision: ‘That where any enactment *not* comprised (?) in the schedule has been confirmed, revived, or perpetuated by any enactment hereby repealed, such confirmation, revival, or perpetuation shall not be affected by such repeal.’ Surely there must here be a grievous mistake. As the clause runs, it is to the effect that what is repealed is not repealed. Perhaps the meaning *intended* is, that though the supplementary or continuing statute has been repealed, the original statute not in the schedule remains in its integrity.

The schedule is one of the most remarkable of entries in the statute-book, and bears the aspect of an article in an archaeological journal or report of a society of antiquaries. It is embellished by a preface descriptive of the various editions of the statute-book, finishing with what might be found in a bookseller’s catalogue—‘The edition of

Ruffhead referred to is that by Sergeant Runnington, 1786.' The Legislature, however, omit to insert the price of this their favoured edition. They are so very considerate as to subjoin to all Latin titles of Acts a free translation into modern English, and still more kindly to give copious footnotes, not only directing the inquirer where a statute may be found, but sometimes there is the significant note of warning and disappointment, 'Not in Ruffhead's edition,' 'No part of this instrument is in Ruffhead's edition.' Again, 'In Ruffhead's edition this chapter, in the form of a short abstract or note of the contents, is placed without a number immediately after chapter 14 and before chapter 15 of that edition.' This is the first instance of the legislative body assuming the character of public instructors, and giving to the statute-book the appearance of an essay on the antiquities of law, after the manner of 'Knowledge made Easy.'

We shall cull at random some of the more startling promulgations of the titles of Acts for the first time repealed, and of course supposed until now to be the law of the land. We had supposed that for a long period of time the endurance of Parliament was constitutionally *seven* years. The Chartist, however, may rejoice in being now authoritatively informed by the Legislature itself, that it was only in last session of Parliament that there were repealed the 14th chapter of 4 Edward III., providing for '*Annual Parliaments*,' and the 10th chapter of 35 Edward III., '*Parliament every year*.' Our Legislature thus proclaim that, for a long time back, they have carried on their sittings in defiance of the statute law of the realm. Surely such ancient statutes as the following could not have been otherwise than temporary, and so required no repeal in the year 1863:—

John, Duke of Bedford, being in the king's service, allowed to appear in suits by attorney.

The *present* mayor of the Steeple of Calais shall stay two years in office.

The Statute of Henry continued for *three* years.

An Act for attainting Thomas Dolman, Joseph Bampffield, and Thomas Scott of high treason, if they render not themselves by a day.

An Act for granting one month's assessment to his Majesty.

An Act for granting an additional duty to his Majesty upon wines for *three* years.

The very announcement of such Acts as are mentioned under-

neath, requiring in the year of grace 1863 to be solemnly repealed, is provocative of laughter :—

The abjuration and oath of thieves.

Inquiry concerning gaolers compelling prisoners to appeal.

House-boot and key-boot within the forest.

Purveyance for the royal houses to be by warrant. Purveyors to take nothing without the owners' consent; purveyance for the wars; purveyance for the king's horses; purveyance for the king's dogs.

A subsidy granted to the king, of the ninth lamb, the ninth fleece, and the ninth sheep. In cities and burghs, of the ninth part of all goods. Elsewhere, of the fifteenth; poor persons excepted.

Aid to make the king's son knight, and to marry his daughter.

The penalties of purveyors taking more sheep before shearing-time than are wanted.

Mayors and bailiffs shall deliver up fugitive labourers.

Punishment of a buyer taking a bribe.

Reasons why the law should be pleaded in the English tongue.

The peace shall be kept and *equal justice administered*. (Is this one of the Acts which has 'ceased to be in force otherwise than by express repeal'?)

No lawyer shall be a judge in his own county.

No shoemaker shall be a tanner, nor any tanner a shoemaker.

The statute of Gloucester, except chapter five, the penalty for telling slanderous lies of the great men of the realm.

Irishmen and Irish clerks mendicant shall depart the realm.

The money called *blanks* abolished.

The contents of vessels of salmon, herring, and eels, and how fish shall be packed. Contents of a barrel of herring which shall be well and fairly packed, the contents of a barrel of eels, and they shall not be mingled.

Benefits of archery; price of long bows shall not exceed 3s. 4d.; penalty, 20s.

An Act that the six clerks of the Chancery may marry.

An Act for the bringing up and rearing of calves to increase the multitude of cattle.

Felonies upon conveying horses to Scotland.

An Act for the true stuffing of feather-beds, mattresses, and quysheens.

An Act against fonde and phantastical prophecies.

An Act for repeal of a clause in a former Act, to prohibit salesmen from selling fat cattle.

From the scope of the statute under comment, it would appear that all these enactments, so curious in their objects and so inconsistent with modern practices, were still in some sense the law of the land down to the 28th July 1863.

The more startling of the enactments of the schedule are those which do not repeal the whole of the ancient statute, but merely the clause which limited its endurance to a period which has lapsed ages ago. Take, for example, the following as an illustration: The 8th chapter of 1 Henry VIII., in part only, namely, the following words at the end of the Act, 'Provided also that nothing penal contained in this present Act take effect before the feast of Easter next coming, and this Act to endure to the next Parliament.' The words in the 5th chapter of 23 Henry VIII., 'This Act to endure for twenty years.' The words in 6th chapter of 43 Elizabeth, 'This Act to endure to the end of the first session of the next Parliament.' The words in 12th chapter of 7 James I., 'This Act to continue to the end of the first session of the next Parliament, *and no longer.*' There are numerous instances of the same kind. The question is here raised: these statutes must either have fallen or not by the lapse of the time to which they were expressly limited. If fallen, they do not, centuries after, require to be repealed. If not fallen, then the repeal only of their limitation is calculated to reproduce them. But the graver question arises, can an ancient law which has slumbered for ages be thus resuscitated by the repeal of the only words which limited its endurance? On the whole, these last instances, of which there are many in the schedule, must be ranked amongst the 'puzzles of legislation.'

We are unwilling to conclude these observations upon the Revision of the Statute Law, without adverting to a topic which we have on former occasions desired to impress upon the attention of the profession.

Revision of the statutes is of little avail in comparison with the aid which the profession might derive from a codification of the law as a whole. We take it for granted that the gentlemen who are now engaged upon what they are pleased to regard as a revision of the statute law, will ultimately complete their task, if they live long enough for its accomplishment. By the time that letter Z of the

library catalogue of the British Museum is announced as ready for publication, or perhaps at that more distant period when the Commissioners for the Reduction of the National Debt shall have received instructions to pay off the last million of 3 per cent. consols, the Queen's printers may probably be put in possession of the manuscript of the revised edition of the statutes. But, after all, when the work is completed, what does it amount to? Merely a saving of paper: nothing more. The statute-book, even when revised, must be searched by indices; because the so-called revision is merely expurgation, and no other kind of revision is practicable without totally altering the character of the statute-book. The difficulties which beset the path of the statute-law consolidator were thus explained by Lord Advocate Moncreiff in an address on the Amendment of the Law, delivered to the Social Science Association at Glasgow; and they appear to us to be insuperable: 'As long as the work is confined to expurgating the statute-book from laws that are wholly repealed, it is comparatively simple; but the next step is surrounded by obstacles and impediments. The re-enactment of statutes partially repealed, and the consolidation of laws relating to the same subject, bring the legal reformer at once into contact with that unwritten law which has sprung from the stem of the statute, or which has been engrafted upon it by judicial decision; and so great is the difficulty of finding new words to express old words, with the interpretation put upon them, that I have a strong impression that we shall never arrive at the real object in view,—namely, an intelligible and a simple digest of the law,—without proceeding at once, at least in some branches of it, to codification—giving up the attempt to express in one statute what has been expressed in many—throwing aside what is, and beginning anew to define what ought to be, the law.'

LEGAL EDUCATION IN SCOTLAND.

A FEW years ago the Scottish public was roused from its customary apathetic state of mind in relation to educational questions, and, stimulated mainly by the efforts of a few enlightened members of Parliament, was induced to lend its support to a Bill for remodelling the constitution of our Universities, which was brought into Parliament under the joint patronage of the present Lord Justice-Clerk

and Mr Moncreiff, then in opposition, and which, as everybody knows, was afterwards passed into law. Our educational reformers, whose ideas and modes of action betray the influence of the school of thinkers on the other side of the German Ocean, while sharing the partiality for method and completeness of arrangement which characterizes the German school, have unfortunately imbibed with these ideas something of that unpractical turn of mind which is so apt to render nugatory those elaborate schemes and symmetrical constitutions for which that school is celebrated. The Universities Act of 1858 is entitled to the praise of being one of the most perfect examples of constitution-making to which the British Parliament has lent its sanction. It has established senates and councils, courts and commissions. The powers of its functionaries are subject to a succession of checks and balances which in theory leave nothing to be desired; and if there had been any risk of the academical function growing into a power too strong for legislative restraint, that danger, beyond all question, was effectually counteracted by the multifarious provisions which give to each of the functionaries whom we have named the power of counteracting or suspending the resolutions and proceedings of the others. Unfortunately, our educational reformers, after successfully launching their constitution, appear to have considered that their labours were at an end, and that the actual supervision of education, and the expansion of the University system of training which is demanded by the high standard of education at the present time, might be safely left to be worked out by the University Commission and the various subordinate courts and councils which they had taken so much trouble to establish. Experience has shown that these hopes were fallacious. After a six years' trial of the new system, it would require a livelier faith and a greater confidence in academical wisdom than we are possessed of, to affirm that the new system has materially elevated the standard of academical instruction in Scotland, or has placed it in a position to invite comparison with the means of professional instruction provided by the establishments of the sister country.

We do not mean to assert that the Scottish University system is open to unfavourable criticism in all the branches of education for which it undertakes to provide. Before the passing of the Universities Act, the Edinburgh medical school was second only to that of London, and, considering the advantages which London possesses in the shape of numerous and richly endowed hospitals, and the

attraction which the lucrative practice of the metropolis presents to medical candidates, the success of the Edinburgh medical school reflects the highest credit upon the management of its University. Improvement was scarcely to be expected, and it is satisfactory to know that our medical school promises to maintain the deservedly high reputation which it had acquired before the new system came into operation. The standard of acquirement in the Faculties of Arts of the Scottish Universities has always been respectable, and the establishment of a few additional chairs by the University Commission has so far improved the curriculum of study for degrees in Arts; while the institution of a variety of honorary offices in connection with the Universities, by conferring dignity and social importance upon their office-bearers, has been the means of leading to degrees in Arts something of that artificial prestige for which they are chiefly sought after. But it is not to these requisites that we ought to look for an answer to the question, whether the Universities Act has served the purpose held out by its promoters. Their case was, that the system of University tuition in Scotland was defective, and that new machinery was wanted for the purpose of providing additional means of instruction. In one department the course of instruction was obviously inadequate.

The course of professional instruction in law consisted, in Edinburgh, of attendance on three courses of lectures, and in Glasgow of only one course. In the Edinburgh curriculum the Conveyancing class embraced only a small and merely technical department of study. The Civil Law course, though excellent as a foundation for more practical studies, could only be regarded as an ornamental adjunct to legal study. The study of the jurisprudence of Scotland, of the system of law in the administration of which the student was to assist as a legal adviser, advocate, or judge, was confined to a single course of lectures by one professor; and the profession have a right to ask how it is that a University Commission in which the legal profession were so largely represented, should have done so little to promote the advancement of a science so interesting in itself, and so important to the well-being of society?

In the observations which we have felt it our duty to make in the interest of the legal profession, it will not be supposed that any criticism is intended with respect to the manner in which the duties of the Chair of Scotch Law have been performed. The appointment to that Chair rests where it ought to be—with the Faculty of Advo-

cates; and the appointments have justified the confidence that has been reposed in that body. From our great institutional writer to the present holder of the office, the Chair has been filled by a succession of lecturers of the highest eminence. The lectures of Erskine, of Hume (on Criminal Law), of Bell, and of More, have been published, and have each in their way become the standard works of reference, either for the general body of law, or for those subjects which their authors had selected for special illustration; and we do not doubt that the prelections of Professor Moir will justify the expectations which his eminence as a lawyer entitles us to form. That the Professors of Scotch Law have done what was possible in fulfilment of the duties of their position, will not be disputed; but it is abundantly clear, and we are sure that the gentlemen we have named would have been the first to acknowledge the fact, that the law of Scotland cannot be satisfactorily taught in a course of lectures, and that no one professor, however eminent, is able to do justice to the merits, or to grapple with the difficulties of so large a subject as that which the Professor of the Law of Scotland is expected to teach.

The inadequacy of the course of instruction in law given at the University, may be easily shown by comparing that course either with the course of legal instruction provided by the Inns of Court, or with the curricula of the Edinburgh University in other departments of professional study. The curriculum of study provided by the Inns of Court extends over several years; and their lecture-ships embrace the various departments of Equity, Common Law, Real Property Law, Contracts, and Conveyancing, in addition to what we have ventured to call the ornamental branches of Civil and Public Law. Each of these chairs is occupied by a lecturer of eminence in the special department, and attendance on the various courses of lectures, or an equivalent examination, is required from candidates for membership. It would be easy to find in the establishments of the Continental Universities a precedent for a more minute division of jurisprudence with a view to practical instruction; but we have selected the curriculum of the Inns of Court for comparison, as an example of what has recently been accomplished by the lawyers of a school not remarkable for their scientific cultivation of jurisprudence, and who have only recently become alive to the necessity of providing an adequate course of professional instruction for their members. The great educational institutions of Oxford and Cambridge do not profess to undertake the department of

purely professional training; and the Inns of Court, being the bodies chiefly interested in maintaining a high standard of legal acquirement, have taken the matter of education in law into their own hands, and have made provision for it in a manner which, if not perfectly adequate to the requirements of modern jurisprudence, is at least greatly in advance of the means of instruction available to students in Scotland.

In comparing the curriculum of *law* in Edinburgh with that of the other Faculties, a mere inspection of the list of professorships reveals the comparative inferiority of the Faculty of Law. The Faculty of Arts embraces twelve chairs, eight of which enter into the ordinary curriculum of study. The Faculty of Medicine embraces thirteen chairs, and attendance at the prelections of all the professors is required to qualify for a degree in medicine. Some of the professors deliver more than one course of lectures, and are able to secure a good attendance. The Faculty of Law makes a good appearance upon paper, as there are no less than six chairs set down as belonging to that department of study. Three of these—the Law of Scotland, Civil Law, and Conveyancing—have already been mentioned; the other three are Medical Jurisprudence and Police, also a medical chair, and filled by an M.D.; Constitutional Law and History, also a literary chair; and the recently revived Chair of Public Law. Of these we shall only say, that, desirable as it may be that students of law should possess an acquaintance with the subjects to which they relate, they cannot be said to contribute to the practical study of that which it is the main object of the Faculty of Law to teach—the positive jurisprudence of our own country. If it is necessary to have four professorships for the instruction of the law student in the ornamental and historical departments of legal science, it must be admitted that the cultivation of our municipal jurisprudence is placed in a disadvantageous position in being confided to a single professor, and that advantage would result from its subdivision into departments in some degree commensurate with those which have been instituted by the English Inns of Court.

Under the present system, the Professor of Law at Edinburgh is subjected to a double disadvantage. In the first place, he has not time to elaborate a satisfactory course of lectures applicable to the whole body of the law of Scotland within the time in which he is required to prepare them. On the other hand, he has not time to deliver a complete course within the limits of the University session. The

consequence is, that the course of lectures necessarily becomes either a mere elementary exposition adapted to non-professional students, but insufficient for the instruction of men who look forward to the profession of the law as their business; or, on the other hand, it degenerates into a condensed digest of statutes and precedents, from which the student can derive but little advantage. Lectures, to be useful, must be copious; but they ought rather to be illustrative than technical. Under the system which our professors have been forced to adopt, a subject is compressed into three or four lectures, which, if properly expanded, might have sufficed for a course of the ordinary length. Under the present system, the student cannot be expected to follow the lectures unless he has prepared himself by such a previous course of reading as would enable him to dispense with them. The proper object of academical lectures is to prepare the student by the simpler method of verbal exposition for the reading of technical works; but that object cannot be accomplished when the lecturer is obliged, by the exigencies of his subject, to treat it in a more technical way than writers who are not subjected to the same restrictions. As matters stand, a student of Scotch law can easily make for himself a course of instruction more sound and satisfactory than by any possibility can be expected at the hand of a single individual. What is wanted is the creation of half-a-dozen lectureships instead of one, each conducted by men who have made a special study of the department of law which they undertake to teach; and until this is done, the student must seek in the law library, and not in the lecture-room, the means of instruction which are requisite to prepare him for the practice of his profession.

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SIR JAMES WILDE ON CONSOLIDATION OF THE LAW.

It is the fashion to sneer at the National Association for the Promotion of Social Science, as having no other end or aim, or at all events result, than that of bringing together a host of *doctrinaire* men and strong-minded women to talk at utmost length, but quite fruitlessly, *de omnibus rebus et quibusdam aliis*. No doubt, at its Congresses much twaddle is spoken, and many wind-bags, which should have been hermetically sealed for ever, or opened only, if at all, in remote glens or by the 'sad sea wave,' are let off in the sight and hearing of thousands. But the Association does good work too, and principally in the way of inducing thoughtful men, in various walks, to give to the public the fruit of great experience and much reflection, which, but for the pressure brought to bear upon them by the Association, would never have seen the light. It is the practice of the Association to secure, as the chairmen of its various Sections, gentlemen of great eminence in one or more of the subjects dealt with by them. In the course of the introductory addresses, which in that character they are called on to deliver, views are often propounded, which they never would have made known through the ordinary channels of the press. Professional men have not time to write elaborate works, except on professional subjects, and even on these only in the outset of their career, and they have a very judicious objection to 'frittering themselves away in sixpenny pamphlets.' An introductory address, however, is quite within the compass of their leisure; and as it is delivered orally, it is not liable to that minute criticism to which they are so sensitively alive.

At the recent meeting of the Association, by far the most valuable address was that delivered in the Jurisprudence Section, by Sir J. P. Wilde, the Judge of the English Court of Probate and Divorce. It will be remembered, that Sir James was appointed to his present office upon the deeply lamented death of Sir C. Creswell. The appointment was received with some apprehension, both by the profession and the public, chiefly on account of the new Judge's state of health. But these fears have fortunately been disappointed, and Sir James has proved himself no unworthy successor of the lamented Sir Creswell. To those who have perused his leading judgments, it is no matter of surprise that Sir James should now come before the public with well established claims to the character of a philosophical jurist, as well as of a successful lawyer and hard-working judge. The address is, indeed, as the *Times* calls it, a 'masterly and eloquent dissertation;' and we would desire to call attention to the views maintained in it, not as being in themselves novel, but as being admirably expressed, and highly sanctioned by the speaker's character and experience. Of course the address, being delivered by an English lawyer in an English city to an audience almost exclusively English, is not in all points applicable to Scottish affairs; but we in Scotland may learn many useful lessons from it, as to the defects of our own law, and the best mode of reforming it.

The first remark which Sir J. Wilde makes in regard to the law of England, and the first which occurs to any one carefully considering our own law, is, how inapplicable it has become to the present state of society. Nor is this to be wondered at. 'Who,' he asks, 'would reasonably expect that laws which, originally highly artificial, were adapted to the time when nearly all property consisted in land, should be fit to pursue the complications of personal property, and the intricate folds of trade? The gradual development which has turned a handful of military adventurers and a population of serfs into the wealthiest commercial community of the world, has surely called for the destruction of as much that was old and useless, as the creation of what was new and requisite. . . . Yes; the life, the body, and even the spirit of the feudal system has passed away, but the armoury of its weapons and defences is still cherished in our halls of justice.'

Feudal justice never was very perfect, and its imperfections have become more and more apparent as times, and manners, and national

circumstances have changed. The law, however, cannot admit its own shortcomings, and so it has gone on trying to fit its own old and rusty framework to the vastly increased and totally altered requirements of the body politic. The attempt was vain, as any one could have predicted, and as experience has painfully proved.

The Romans, also, had about as little acquaintance with mercantile affairs as the Normans. The influence of the Civil Law, therefore, on our island jurisprudence was not a whit more beneficial commercially than the Feudal Law. To both systems, in point of fact, commerce, with all its relations, was practically unknown; and therefore the chapters which should have dealt with its regulation were a complete blank. Of course the change in the national habits and employments, which converted us from a military people in the Conqueror's time to a 'nation of shopkeepers' in Napoleon's, was a very gradual one. But that very circumstance, while it made the inconvenience less felt at first, was perhaps the chief cause of its ultimately proving so serious. Had the nation become *per saltum* a commercial race, if one could conceive such an event, the necessity of the case would have compelled the creation of a mercantile code, pure and simple. As things really went, however, an attempt was made to accommodate the existing rules of law to the changing requirements of the country. This, of course, could only be done by the use of forced analogies, and the liberal employment of legal fictions. As Sir James Wilde puts it:—'Did a new position arise, for which the jurist had no precedent, analogy was resorted to. If no near analogy was at hand, a more distant one was sought; if none was found in the region of similar rights, a more remote one, taken from a different class or branch, was often brought forward and bent, perhaps distorted, till it served the end in view.' It needs no skill in statesmanship or jurisprudence to know that a legal system so framed must be quite inadequate to the requirements of the country, and must, in very many instances, be productive only of injustice to those who invoke its aid.

But Sir James goes on to show, secondly, that the evils we have just been describing are enormously aggravated by the immense bulk of the law. 'Each year,' he says, 'now calls into being a number of decided cases so large as to threaten the extinction of the law as a conscientious study. I do not stop to inquire into causes, but the fact is, that the present century has added more decided cases to the law than are to be found in the records of the five preceding centuries

put together. This vast agglomeration breeds not only confusion in those who are to be bound by the law, but inconsistency in those who administer it. No power of assimilation can keep pace with such production; and the tribunals, occupied to the full with the business before them, have little time to master the results of contemporary decisions. This evil is aggravated by a competitive system of reporting, and the record of useless decisions; but the source of it lies deeper, and the time has now come when we may well ask whether the record of our law is always to lie in detailed instances, whether its principles are capable of no exposition, and whether the most laborious and wealthy community in the world will be content to pass on to posterity a shapeless mass of scattered laws as the legacy of its labours and its wealth? For some idea as to what the bulk of the law is, we refer to Professor Muirhead's admirable address, delivered last winter before the Edinburgh Chamber of Commerce. At page 9 the Professor observes:—'Therefore I say, that to learn the law of Scotland you must seek for it, not only in the Statute Book, but in nearly 200 volumes of reports; while if you would know with certainty that of England, you must wade through nearly 1100 volumes of the same class! Know with certainty! Can certainty be attainable on such conditions? Is it not mockery to tell a man—as every subject of the Queen is told—that he is bound to know the law, and must pay the penalty of his ignorance of it, while, instead of giving him facilities for knowing it, you beset him with next to insurmountable obstacles!' The Statute Book, we may add, consists of about 50 volumes, each containing, on an average, 1000 closely printed pages; and the Acts of Parliament themselves, public, private, and local and personal, number between 30,000 and 40,000. Such a mass it is clearly impossible for the greatest industry and genius to grasp, and to ordinary minds the mere mention of the task is overwhelming. To alter a well-known saying, modern lawyers, not to say laymen, can but 'gather a few pebbles on the shore of the boundless ocean of the law.' Such an enormous evil as this, it is high time that steps were taken to mitigate.

Accordingly, Sir James Wilde proceeds, in the third place, to inquire what is the remedy which should *now* be adopted. His aim is of course to reduce the bulk of the law, to adapt it to the existing circumstances of the nation, and to simplify its provisions. Two courses offer themselves for consideration. The first of these is, the formation of a code; the second, that of a digest. Both have their

advocates, both their advantages and their defects. To many philosophical minds a code is the only proper form of a great national system of jurisprudence; its exact proportions and rigid provisions alone satisfy their ideas of the scientific accuracy indispensable to such a work. They point with pride to the various sections of the Code Napoleon, and to the modern Mercantile Code of Germany. And doubtless these codes are monuments of the industry and genius of their framers. But the former has proved a most fruitful source of litigation in France, and of the latter the experience has been far too short to enable any one to speak confidently. As Sir J. Wilde remarks:—‘The truth is, that the intricacies and complexity of possible combinations of fact are beyond the range of human conception, and any attempt to foresee and provide for them all beforehand, and dispense a ready-made justice with success, will give little reward to the labour it wastes. But a code resting on no detailed decisions or elaborated instances to expound it, has an especial evil of its own. There is no more fruitful source of doubt and litigation than the meaning of language. The careless use of language does much, but the inadequacy of language as the vehicle of precise thought does perhaps even more. What treaty, or code, or statute, was ever so framed that its meaning, in all possible contingencies, was free from reasonable controversy? Now, the especial evil of all codes and statutes is that, over and above the difficulty of framing adequate principles, the ambiguities of construction are introduced. Expressed in certain definite language, its force depends upon the interpretation which ingenuity may give or deny it.’ These considerations seem to show that the formation of a code, however desirable in a scientific point of view, is at all events at present beset with so many difficulties and dangers, that it would be vain to attempt it. The other course, and that which Sir James Wilde recommends, is to digest and consolidate. This has many advantages, though it has few charms for scientific jurists. What good work might by this means be done, is beautifully expressed by Sir James when he says, ‘Instances in place of precepts, examples in the place of rules, our recorded decisions stand thick together like a fair field of grain, full of wealth and worth, but waiting the hand that shall gather it into sheaves, and store it to the use of man.’ Nor does he despair of seeing the good work begun, and even done, in his own time. ‘I hope I am not too sanguine in this, but I cannot resist the belief that, within the bounds of reasonable labour

and time, the general principles and broad bases on which our common (?) law reposes, and which tacitly guide the decisions of our Courts, might be brought to the surface, grouped together, subordinated in their several relations, and contrasted in their differences. An attempt of the kind, and not without great success, was made by the late Mr Smith in his *Leading Cases*. And those who have studied the notes of that book, will not fail to perceive how easily, and with what success, large groups of cases, treated and handled together, have been made to yield up short and succinct propositions of law. What I desire to see is a similar attempt made with authority, and on a much larger scale, to be finally confirmed by Act of Parliament.'

Such is the rational and practicable scheme which Sir James Wilde proposes should be immediately adopted, and its execution commenced, for the reform of the law. The present Lord Chancellor holds similar views, and they are generally participated in by all rational law-reformers. Of course the task would be an Herculean one; but the best legal talent in the country should be engaged upon it, and then the result of their labours would at once be accepted as authoritative.

In Scotland we have the way prepared for such a digest by the admirable treatises of Erskine and Bell. But still much would require to be done, and it cannot be begun too soon. Sir James Wilde began his address by congratulating himself and his English hearers on the thorough reform which has taken place in recent years in the procedure of their Courts. He was able to speak of 'the clearing away' of 'expense, delay, uncertainty—these three monster evils which barred the access of the suitor, or terrified him into submission.' Unfortunately we cannot, in this end of the island, indulge in any such congratulations. Our system of judicial procedure is still as bad as can be, involving, not avoiding, those 'monster evils'—'expense, delay, uncertainty.'

That we labour under a complication of evils is, however, no reason why we should fold our hands in indolence and apathy. Rather let us make the more vigorous efforts to get rid at once of all the defects of our legal system, whether these relate to the procedure in our Courts or to the body of the law. Let next session of Parliament see the re-introduction of a 'Court of Session Bill,' and the launching of a well-considered measure for the Consolidation of the Law of Scotland.

ON THE CONDUCT OF CRIMINAL CASES AT CIRCUIT.

THOSE members of the Bar who have been in the habit of attending the Circuit Courts during the last few years, are well aware that, in connection with the criminal business of the circuit, it has become a rare thing to receive a fee ; and that even when a fee does accompany an indictment, its amount is sadly disproportioned to the responsibility incurred and the work done. Of no circuit is this more true than Glasgow, and yet nowhere are there so many prisoners tried whose circumstances and appearance justify the supposition, that they can well afford to remunerate both counsel and agent. It is no uncommon thing to find men standing in the dock at the Glasgow Circuit Court charged with serious offences, such as culpable homicide, aggravated assaults, or forgery, in the position of small farmers, public-house keepers, or skilled artisans, regarding whom counsel are informed that poverty prevents them paying a fee for their defence, and whose cases are accordingly conducted, so far as the Bar is concerned, gratuitously. Again, there is never a circuit held in Glasgow without several cases of housebreaking and robbery being tried, in which the prisoners are experienced 'old hands,' who are well known to be abundantly supplied with money, who, when at liberty, 'fare sumptuously every day,' and who have friends of their own class, both able and willing to supply them with funds for their defence ; yet, in the majority of such cases, the advocate is asked to give his skill and his time without fee or reward.

We have no inclination to keep out of view the principle, that the remuneration of lawyers is in a different position from that of ordinary professional charges, and that it is the duty, or rather the privilege of counsel, under certain conditions, to plead gratuitously for those who are too poor to pay them. It has never been, nor will it, we trust, ever be suggested, that when the conduct of a criminal case is undertaken without a fee, the duty is less carefully and anxiously performed than if a liberal fee had accompanied the indictment. But, on the other hand, there is no reason why an advocate should give his services gratuitously to those who are perfectly able, and, as we shall explain immediately, are in many instances perfectly willing, to expend money on their defence. That such is often the case, we have good reason to believe ; and it does not therefore seem an altogether unnecessary inquiry, whether the existing arrangements in regard to the conduct of criminal cases on

circuit stand on the best footing, having regard to the interests alike of the advocate and of the accused.

The legal obligation imposed upon advocates at their admission to practice, is defined by the Act of 1537, c. 35, as 'to procure for everie man *for their waigis*.' In matters criminal, the Statute of 1587, c. 91, benignly extends the obligation, when it requires, 'That all and whatsumever lieges of this realme, accused of treason, or *for whatsumever crime*, sall have their advocates and procuratoures, to use all the lauchful defences, quhom the judge sall compel to procure for them, in case of their refusal, that the sute of the accuser be not tane *pro confesso*, and the party accused prejudged in any sute, before he be convicted be lauchful trial.' It is well known that this rule is uniformly observed,—a prisoner in Scotland never being left, except at his own request, to conduct his defence without the assistance of an advocate and an agent. But it was never intended that this merciful provision for the poor and unlearned should be taken advantage of by, or should be open to, those who are able to pay for professional direction and assistance. Accordingly, in the practice of the High Court of Justiciary, the Societies of Writers to the Signet and Solicitors nominate *their youngest members annually* to act as agents for such criminals as require to plead *in formâ pauperis*, thus giving these young practitioners, as compensation for their labour, an opportunity of making themselves acquainted with the forms of process, and putting them in a position favourable for acquiring experience in such matters as the getting up of evidence, and the general conduct of a case previous to trial. The same practice obtains in many, if not in all, the Sheriff Courts throughout the country, and is a sensible and satisfactory arrangement. A somewhat similar plan is followed by the Faculty of Advocates, in connection with the High Court; that is to say, certain of their body are annually nominated to act as counsel for the poor in civil and criminal cases. They are not, however, necessarily, or usually, taken from among the youngest members of Faculty, nor is there any limit to the term during which the office may be held. The custom has crept in, too, of allowing each advocate so appointed to name his successor,—the consequence being, that many members of the Bar do not even get this chance of gaining a knowledge of practice, as the post is handed on from friend to friend, without reference to any fixed rule of succession. It is proper to bear in mind, in connection with this subject, that such an appointment is of much

greater value to a young advocate, than to a member of the other branches of the profession. An advocate serves no apprenticeship before his admission to the Faculty. He has, in the majority of instances, seen nothing of the forms of process and pleading before being called to the Bar, and he has an amount of leisure to take advantage of the opportunity to gain experience by gratuitous practice, that in the majority of cases is denied to the young W.S. or S.S.C. The latter very frequently remains in the position of a clerk after he has passed, and often finds the 'poor agency' an incumbrance of which he would gladly be rid. The great object of the former, on the other hand, is to fill up his time as much as possible with work bearing directly on his profession; and, in the absence of lucrative employment, unpaid practice, honourably obtained (as it can best be by nomination to the post to which we refer), is of immense consequence to him. Regarded merely as a necessary branch of professional culture and training, the regulation of gratuitous practice has just claims upon the attention of those members of the profession who have ceased to be personally interested in the matter.

Reverting now to the practice of the Circuit Courts,—What opportunity for gaining experience do the existing arrangements, in regard to the division of 'poor' business, afford to a young counsel? On arriving at the circuit town, he will find perhaps a heavy calendar, consisting, it may be, of seventy or eighty cases, and of these he will probably learn that four-fifths are 'poor cases;' that is, cases in which the accused is unable to pay a fee, and which are accordingly under the charge of the gentlemen who have been appointed to act as procurators for the poor. He will not unnaturally expect that one or two of these cases will be assigned to him. He is most willing to take them without pecuniary remuneration, as indeed he has come, not for the purpose, or with the hope, of making money, but of seeing practice and gaining experience. He will, however, speedily discover that he is supposed to have no claim to any share of the gratuitous work of the circuit, and that his chance of holding a single indictment, depends on certain conditions, which he may be either unable or unwilling to fulfil. In short, he will find that the absolute patronage of the unpaid work of the Court rests with the agents for the poor. If he has a previous acquaintance with these gentlemen, or if any of his friends have requested them to employ him, he may get work in abundance.

Nay, if he chooses so far to forget the usages of the body of which he is a member as to ask for cases, he will probably not be refused; but, except by one or other of these modes, he will assuredly fail to gain, what is probably his main object in being there at all, an opportunity for actual engagement in professional work. It will of course be understood that in these observations we blame the *system* only: the procurators for the poor merely exercise what they have been led to consider their undoubted right, when they select their counsel in unpaid, with the same partiality as in paid cases. It can hardly be expected indeed that they will act otherwise, until there is a nomination of counsel for the 'poor' business of the circuit, as there is for the same kind of work in the High Court; and the principle recognised that the agency for the poor is a *munus publicum*, and is not to be used as a means of pushing forward individual counsel, or gratifying personal predilections. We do not stop to suggest any detailed mode of carrying out such an object, but we feel confident that any plan having for its aim a compulsory and equal distribution of circuit practice among those junior members of the Bar who choose to undertake it, would meet with the general approval of the Faculty, and would receive the cordial sanction of the Justiciary Judges.

There seems to us, however, to be a still more glaring defect in the existing mode of conducting circuit business. Perhaps we should speak more accurately if we confined our remarks to the *Glasgow* Circuit, although it is not unlikely that a similar state of things will be found in other towns. In many cases, as we have already pointed out, the position of the prisoners is such, that one is surprised to be informed that they are unable to pay for their defence. In other cases a very small fee is paid, accompanied by profuse apologies for its amount on the part of the *soi-disant* agent who has charge of the case. Sometimes, of course, these apologies and explanations are genuine, and the remuneration is as large as the unfortunate accused can afford. But, on the other hand, there is no room to doubt that in very many cases the money which the prisoner has intended for his counsel, and which he has handed over to his 'doer' for that purpose, never gets beyond the latter, or, if a fee is paid at all, it is a much smaller one than that which the funds in the agent's possession warrant him in paying. The regularly appointed procurators for the poor are, we need not say, incapable of such misappropriation of funds handed to them by the prisoners,

nor have we any reason for believing that such a charge could with fairness be made against a single member of any of the recognised grades of the legal profession in the country. On the contrary, we know that in Glasgow at least, the younger procurators are loud in their complaints in regard to this very matter. It is not of them that we speak, but of individuals unconnected with their body, who irregularly and improperly assume their functions.

Prisoners in custody before trial are very rightly allowed all facilities for communicating with friends in regard to their defence, and access to the jail is readily granted to any persons who represent themselves as employed in the prisoners' interest. In some instances, regularly qualified agents are employed, and to their conduct no suspicion can attach ; but the prisoners are not, of course, bound to employ members of the Faculty of Procurators alone, and in many of the most important cases, the charge of the defence is entrusted to persons who, in every sense of the word, are *unqualified* to act as agents. Such amateurs professing great sympathy with the accused, much experience in the getting up of evidence, and an acquaintance with the qualifications of counsel, undertake to secure the attendance of exculpatory witnesses, and the services of some experienced and popular advocate. For these purposes they are often liberally supplied with funds by the prisoner or his friends ; the necessity for paying a large fee being the principal excuse for demanding money. In how many instances the money finds its way into the pocket of these 'doers,' without a single precognition being taken or witness brought, any one who has attended more than one or two circuits could tell ; while in many cases the indictment is handed a few hours before trial, without a blush, and without a fee, or, at the best, with a very small fee, to one of the younger members of the Bar. In such circumstances, an advocate is helpless, unless his suspicions are previously aroused. He undertakes the case under the belief that he is being instructed by a qualified practitioner (and he is entitled to assume this till the contrary appears), while it is only in the course of the trial that the expressions of surprise and disgust which escape from the panel, at finding that those witnesses on whose evidence he relied have not been summoned, or when, as has sometimes occurred, the prisoner makes an indignant complaint as to the poor return which he has got for the sum with which he furnished his agent,—that the true state of the case is disclosed. We happen to know that not very long ago a member of the Bar, attending at one of the

circuits, was requested by a person, whom he presumed to be a qualified practitioner (but who, in fact, did not belong to the profession at all), to conduct a case in which the charge was of considerable gravity. He was very expressly told that the panel was unable to afford to fee counsel; and on his asking why the indictment was not in the hands of the agents for the poor, he was glibly informed that the case had been undertaken by the person who addressed him from charity, and on account of his having had some previous knowledge of the prisoner and his relatives. The counsel undertook the case, and after perusing the declaration of the prisoner, and learning the import of the testimony which would probably be given by the leading witness for the Crown, came to the conclusion that it was his duty to advise his client to offer a plea. The 'agent' was nowhere to be seen, and accordingly the counsel went to the prisoner in the cell adjoining the court, and told him his opinion, and his reasons for it. The prisoner seemed to think that the advice indicated a disposition to shirk work, and was apparently disinclined to follow it. As the counsel was leaving him he said, evidently under the impression that the advice which had been given was not disinterested, but had its origin in laziness or insufficient remuneration, 'I gave Mr — L.5 to pay ye, sir; and I'm sure he could get other L.2 frae my faither, if that would gar ye speak for me.' Upon inquiry, the 'agent,' so-called, admitted that he had received the money. That the above is not a solitary instance we can have no doubt. One of the most experienced criminal officers in Glasgow told the writer that he could not understand how Circuit Court practice was not generally remunerative, as he was certain, from his own knowledge, that many of the prisoners had the command of large sums of money, and that it was not an uncommon subject of boasting among them, how much they had been able to pay their 'lawyer.'

The best means for preventing the recurrence of such fraudulent practices as we have referred to, are perhaps not very easy to discover. That they should be rendered impossible, or nearly so, is desirable, not only for the sake of the regularly qualified practitioners and the Bar, but quite as much for the sake of the accused. The interests of prisoners are constantly betrayed by the dishonest men to whom they entrust their defence, not only by their failure to employ counsel of experience, but also, still more seriously, by their taking no trouble to precognosce the witnesses for the prosecu-

tion, and to arrange for the attendance of witnesses when the case admits of exculpatory evidence. It seems to be understood that, in the practice of the criminal courts, prisoners are entitled to employ as their 'doers' whomsoever they please, irrespective of their having any professional *status*; but, at any rate, it is in the power of counsel to refuse to take instructions from those who are not qualified practitioners. If this rule were followed, there would be at least some guarantee that both prisoner and counsel were being honestly treated, and a hardship of which some of the younger members of the profession in Glasgow not unnaturally complain, namely, that those prisoners who are able to pay for an agent employ unqualified practitioners, would be materially diminished. In fact, if advocates only observed the same professional etiquette on circuit, as they do with *very* few exceptions in their Edinburgh practice, much of the evil to which we point would be prevented. Let counsel refuse to take charge of any indictment, except on the instructions of those whom they know to be members of the local Faculty of Procurators; and, further, let them refuse to undertake any case gratuitously, unless at the request of those gentlemen who have been appointed agents for the poor. In this way only can the rights and the position of the juniors practising at the Circuit Bar be effectually maintained, and the privileges of the local procurators respected. Other means might doubtless be adopted. The procurators of Glasgow are in the habit of wearing gowns when they practise in the Sheriff Court; let them adopt the same means to make their *status* recognisable in the Circuit Court. Again, the judges, one would think, ought, if not personally, at least through the clerks of Court, to see that none but agents holding an attorney's certificate are permitted to practise. The Advocate-depute, as counsel for the Crown, would not surely be overstepping his province if he were to communicate with the Solicitor of Inland Revenue, with a view to the prosecution of unlicensed practitioners in the Court of Exchequer. But the remedy which is in the hands of the Circuit Bar itself, would unquestionably be the most efficacious.

The evils of which we complain might be still further checked, by the adoption of one or other of the systems to which we have alluded in the outset, namely, either the system of equal distribution among counsel in attendance, or the nomination of a certain number of the junior members of the Bar as standing counsel at each circuit for such prisoners as wish to defend themselves in

formâ pauperis. If no fee accompanied an indictment, it would then go, as a matter of course, to one or other of these gentlemen, the appointment not being left, as now, to the choice of the agent, but depending on a fixed rotation.

We trust that nothing we have said will be supposed to point to the conclusion that counsel should give their services to prisoners only on condition of receiving payment. There can be no nobler exercise of the profession of an advocate than the giving of aid and advice to the poor and friendless, and it is neither possible nor desirable to return to the barbarous practice which preceded the enactment requiring that all accused persons shall have 'their advocates and procuratoures.' The same rule is followed in France, where, as with us, the Court nominates a counsel for each accused person who has not been able to secure one for himself. In England, it is true, the practice is somewhat less beneficent. In that country, if the prisoner is poor, he can do nothing but say what he has to say at his trial. He is, however, entitled by statute to a copy of the depositions in the hands of the prosecutor at a small price (1½d. for each folio of ninety words); and, by the custom of the Bar, he may, if he pleases, call upon any barrister in court, when he is brought up for trial, to undertake his defence, upon tendering a fee of one guinea. In the case of a really 'poor' prisoner, we cannot but express our concurrence with the remark of a recent writer in regard to this rule—'Considering the extreme misery of those who offer it, it might be more graceful to dispense with the fee.'

But while this is so, it seems to us nevertheless desirable that the unpaid business of circuit should be made available, as far as possible, for affording practice to all junior barristers who wish to have it; and that, in those cases in which the prisoners are in a position to pay for professional assistance, their interests, and those of the profession, should not be injuriously affected by the intervention of 'middlemen,' who give no help in the conduct of the case, and who are practically responsible to no one for the way in which they deal with the funds provided for the prisoners' defence.

THE IMPROVEMENT OF LAND ACT AND THE LAW OF ENTAIL.

THE restraints which the Statute of 1685 imposes upon proprietors of entailed estates, have been very materially relaxed by an Act of the last session of Parliament, bearing the significant title of 'Improvement of Land Act, 1864.' As the Act itself has appeared in our impression of last month, it is needless to trouble the reader with a detailed narrative of its provisions. These provisions are too suggestive of ulterior changes to be passed over in silence; but the briefest statement of their nature will suffice to render intelligible some propositions for the final adjustment of the law of entail, which their perusal has suggested to us.

The new Act (27 & 28 Vict. c. 114) differs from the previous Entail Statutes, in being applicable to the whole United Kingdom; and while seeking in common with them the improvement of entailed estates, by means of money to be obtained upon the security of the entailed estates, it has the advantage of being prospective in its operation. Applications under it, moreover, are to be made not to a court of law, but (§ 2) to the Inclosure Commissioners for Great Britain and Ireland respectively; who, by their establishment of engineers, surveyors, etc. (§ 15), are to inquire whether the improvements contemplated are likely to increase the permanent value of the estates to the extent of the outlay upon them, and to give or withhold their sanction accordingly. It is indeed provided (§ 18), and the precaution is a prudent one, that if any person entitled to notice under the preceding section shall appear to oppose the application, or if the applicant is the father of minor children, who might have an interest to object, the application shall not be proceeded with on its merits, until an order has been made by the Court of Chancery, or the Court of Session in Scotland, disposing of such actual or possible objections. But it is not likely that applicants will often be met with active opposition in the Court of Session, seeing it is elsewhere provided (§ 24), that persons in the situations of guardians and trustees, shall neither be obliged to signify a dissent from any application under the Act, nor be in any way responsible for the consequences of the application.

The kind of 'Improvements' for the execution of which the Legislature proposes to make provision, are defined in section 9. It may be sufficient to say, that the definition embraces every description of outlay for the benefit of the estate, which has been named or indi-

cated in previous enactments, besides a general definition of very broad import. Any expenditure calculated to yield a return in the shape of increased rent, would appear fairly to fall within the scope of the Statute.

But, as we have observed, the most important feature of the new Act is, that it is prospective in its operation. Under former Acts the proprietor was left to improve the estate, in the first instance, at his own risk, and was then permitted, if he could satisfy a Court that the improvements were beneficial, and of the nature contemplated by the Statute, to have them charged upon the entailed property. The proprietor was therefore under the necessity of executing the improvements upon his personal credit. Under the 'Improvement of Lands Act, 1864,' the entailed proprietor may obtain a provisional order from the Commissioners sanctioning improvements proposed to be executed, and if they are executed in terms of that order, he is entitled to have the expense charged upon the estate as of course. The expenses chargeable on estates under the authority of the Act are preferable to all other charges; and as the lands must be disburdened in twenty-five years, provision is made for the extinction of the charge by annual instalments.

The most novel and startling provisions of the Act are those contained in sections 78-89, the subject of which is described in the introductory words as the '*Charging lands with money subscribed for the Construction of Railways.*' Any landowner (which word includes entailed proprietor) desirous of subscribing for shares or stock in the capital of any railway company whose works are unfinished, or for additional stock required for the extension or completion of such railway, 'the same being upon or near to, and which will improve or benefit the lands of such landowner,' may apply to the Commissioners for authority to charge his subscription to the company's stock upon the estate (§ 78). The Commissioners are to dispose of the application after inquiry; the charge is to provide for the extinction of the debt by instalments; and the stock, or so much thereof as has not been disburdened by periodical payments, is to belong to 'the persons who for the time being shall be bound to make the periodical payments' (§ 85).

The result of this, coupled with the preceding statutory enactments, is, that as regards all purposes for which an estate may fairly and prudently be burdened, the prohibition of the Statute 1685, applicable to the contraction of debt, is virtually repealed. For some purposes, of

course, it still exists, the chief of these being the protection of landed proprietors from their own possible improvidence. When the Legislature shall authorize some fitting tribunal to sanction the raising of money upon the security of entailed estates for the purpose of being beneficially employed in speculations at Homburg or Monaco, the time will have arrived for the formal abrogation of the second prohibition enjoined by the Statute of 1685. This and all previous statutory relaxations of the law of entail proceed upon the just and reasonable assumption, that the object of the Entail Statute was merely to secure the inheritance to the heirs of the destination ; not to fetter the land by arbitrary and useless restrictions. The prohibition against contracting debt upon the security of the estate is therefore only to be enforced where the interests of the next heirs would be affected by a breach of it. The heirs sustain no detriment by the contracting of improvement debts ; therefore improvements are permitted to be charged upon the estate to the extent to which the Court or the Commissioners may be satisfied that they are beneficial.

The question which has been suggested to us by the perusal of the Improvement Act is this : Why should not the *first* prohibition of the Statute of 1685 be dealt with in the same manner as the *second* has been ? Both are properly subservient to the object of the *third* prohibition,—the security of the inheritance to the heirs of the original destination ; and that object, as it appears to us, would not be seriously interfered with, if heirs of entail were permitted to sell portions of their estates at the sight of the Court, and subject to the condition of reinvestment upon the conditions, and to the heirs of the existing investiture.

The legislative authorization of sales of entailed property to a limited extent and under suitable restrictions, would obviate the most formidable of the arguments which have been directed against the law of entail itself. These arguments, we scarcely need say, are, *first*, its tendency to restrict the distribution of wealth by concentrating the real property of the country in a few hands ; *secondly*, its tendency to check improvement by disabling the proprietor from raising money for the purpose on the security of his estates ; and *lastly*, its actual operation in tying up the land, so that not the smallest piece of it can be bought and sold, even for purposes of urgent utility. The first of these is rather an objection to the law of primogeniture

than to the law of entail ; the second has, to a great extent, been obviated by the series of Statutes conferring borrowing powers upon entailed proprietors, to which the Act of last session belongs ; the third objection remains unanswered.

It is true that heirs of entail have been able to obtain private estate Acts authorizing the feuing or conversion of their property ; but the fact that the law may be suspended in favour of individuals is obviously no answer to an objection directed against the law itself. It is further to be observed that, under the later Entail Amendment Acts, entailed proprietors may obtain, by permission of the Court, authority to excamb and also to feu portions of their estates to a limited extent. This is, of course, so far a boon to the public, but the concession does not go far enough. Excambion is just barter, the rudest form of exchange, and one which, except by savages and proprietors of entailed estates, has been universally abandoned in favour of mercantile exchange or sale. To attempt to demonstrate the advantage of sale over excambion would be as superfluous as to prove the superiority of alphabetic characters to hieroglyphics. We presume that what the framers of the Act of William IV. had in view, was the securing that the equivalent received for the entailed land should be in the shape of land. But this condition may be just as effectually ensured by providing that the price of all lands sold under statutory powers should be invested in securities approved by the Court, in trust for the heirs of the destination, and for the purpose of being applied to the purchase of other lands as soon as a suitable investment can be found. The machinery of the Lands Clauses Act is perfectly sufficient ; all that is wanted is legislative authority to make that machinery applicable to all purchases by agreement not exceeding a certain proportion of the estate, irrespective of the purposes for which the land may be required.

Two useful results might be expected to follow from such an extension of the powers of entailed proprietors as we have suggested. First, any proprietor of an entailed estate, who had the opportunity of buying land convenient to be held with his estate, would be enabled to sell a portion of the property already in his possession, and to pay for the new acquisition with the price. This cannot be accomplished by excambion under the present law, because the person from whom the entailed proprietor purchases may want money and not land, or he may want land in a different locality ; and further, the entailed

proprietor may be able to find a purchaser who will be content to take less land for the money required than the seller would, who, if forced to take land, would insist on getting it at a good bargain. The other result to which we allude is the facilitating sales of land for manufacturing and commercial purposes, and for villas. Though this object can even now be partially accomplished by feuing, we are not inclined to attach the less importance to the legalizing of absolute sales. The law at present discourages transactions in land, and clogs them with a variety of impediments. The landowner naturally enough forms the opinion, that laws passed in the interest of his order have strong claims upon his support, and that what those laws frown upon and barely tolerate must be prejudicial to his interests. Let the Legislature only proclaim the principle of free commerce in the land itself, without prejudice to the interests of future heirs in its *price* or *value*, and we believe that the jealousy of commercial interests entertained by the Scotch proprietary body, which has been the subject of so many complaints, would be speedily dissipated; and that the landowners themselves would, as in the case of the Corn Laws, be the first to recognise the benefits resulting from the liberation of the soil from the fetters of protective legislation.

THE MONTH.

UNDER this title we have been accustomed, from time to time, to epitomize the professional news of the current month, and to comment upon topics which were either of temporary interest, or which admitted of being treated with greater brevity than the subjects of our ordinary articles. Last year we were induced to discontinue this part of our publication, from an impression that the space allotted to comments upon passing events might be more advantageously given to leading articles of permanent interest, or to articles confined to some distinct subject. Some of our subscribers, whose opinions are entitled to the greatest respect, have expressed the wish that our monthly comments should be resumed; and as we have occasionally found a difficulty in dealing with topics which did not require more than a very brief notice, we purpose to recommence 'The Month,' and to continue it during the period which includes the sittings of the Court and of Parliament. We are disposed to think that it will not be necessary to have an article specially ap-

propriated to news during the long vacation, when so much of our space is necessarily occupied by our reprint of the Acts of Parliament.

The Sheriff-Substitutes' Salaries.—The readers of the *Journal of Jurisprudence* are aware that, while opposing on public and professional grounds the proposal which originated with a small section of the Sheriff-Substitutes to abolish the office of Sheriff, and thereby to deprive the public of a cheap and expeditious system of appeal, we have never been backward in recognising the claims of the Substitutes to be put on a footing commensurate with that of the English County Court Judges, with respect to their duties and emoluments. We do not mean that our local Judges should be paid the same salaries as the English County Court Judges, because the scale of remuneration for all public appointments in Scotland, from those of the Lord Justice-General and Lord Advocate downwards, is lower than that of England. But having regard to differences in the scales of public remuneration, and perhaps also to differences in the average amount of work performed, our local Judges are entitled to salaries equivalent to those of their English brethren.

It is therefore most satisfactory to us, as it will doubtless be to the profession at large, to learn that the Government has taken advantage of the present favourable state of the public finance, for revising the salaries payable to Sheriff-Substitutes. Whether regarded as an act of justice to a useful and meritorious branch of the public service, or as an inducement to men of superior talents and acquirements to offer themselves for this class of appointments, the step is entitled to unqualified approval; and we trust that no merely economical considerations will be allowed to interfere with its completion on a liberal, and we will add, on a comprehensive scale. The salaries of the Sheriff-Substitutes of Aberdeen, Dundee, and Perth, have already been increased to L.900 per annum. The junior Substitutes of Edinburgh and Glasgow have also obtained an addition to their salaries; and it has been intimated that advantage is to be taken of the powers conferred by the Act of last session to raise the salaries of the senior Substitutes in these cities, although at the time we write, we believe the arrangements regarding those offices have not been completed. The Home Office has also under consideration the claims of the other Sheriff-Substitutes throughout Scotland to a proportionate augmentation of salary; and it is to the

claims of the country Sheriffs that we desire, in a few sentences, to direct the attention of the profession. The public, whose opinion in such matters is best represented by the voice of an intelligent profession, have an interest to require that the remuneration of local Judges shall be so fixed as to secure that their offices, when they fall vacant, shall be filled by the appointment of men of fair professional standing and experience, a condition which can scarcely be fulfilled while the actual minimum salary of a Sheriff-Substitute stands at so low a figure as L.550. That the salaries should be proportioned in some degree to the amount of business to be performed, we grant; but it is a mistake to suppose that really capable men will accept a poorly paid appointment merely because the field of employment is remote, and the labour light. Justice must be administered in Kirkwall and Tobermory as well as in Perth and Dundee; yet supposing the salaries to be equal, we believe that any man possessed of the requisite judicial qualifications would prefer active employment at the last-mentioned stations, to ease, even when combined with dignity, at the former. Professional men, in short, must be well paid to induce them to exchange the professional and social advantages which they enjoy as practitioners in town, for a position of retirement and comparative obscurity in the country; and it is the interest of the public to offer adequate salaries in order to obtain the appointment of efficient Judges. Under the present system, the Sheriff-Substitute, excluded as he is by Statute from all avenues of professional occupation, is too often placed in an inferior position, as regards emolument, to the Procurator-Fiscal, who gives only a portion of his time to the public service, and to the Sheriff-Clerk, who may act by deputy, and give none of it.

Conversion of the Outer House into a Third Division.—If we may judge from the communications we continue to receive from many quarters, the profession are thoroughly in earnest in the desire that steps should be taken to shorten the procedure in the Court of Session. In our present impression will be found two letters upon the subject, both from men well qualified, in point of professional standing and experience, to give advice upon the subject. Their propositions are different, though not inconsistent. Both recognise the necessity of getting rid of some of the existing excrescences of our system of procedure, while differing in their views as to the quarter to which the operating knife ought to be applied. One correspondent

points to the practice of the Criminal Courts, and very pertinently inquires why the system of trial upon the original writ—call it indictment, summons, or what you please—with the general issue for a defence, a system which has been found to answer the requirements of justice in the Criminal Courts, should not be equally good for the disposal of matters of civil contention. He forgets, however, that the Lord Advocate's Bill, which he somewhat hastily assumes to be laid on the shelf, was based on the principle of reducing pleading to its simplest elements. That the system of no-pleading, or trial upon a summons and general issue, may be successfully applied to the disposal of civil causes, is proved by the experience of the Small Debt Courts; and although we are not prepared to go the whole length of abolishing pleading, as suggested by our correspondent, we agree with him in thinking that no-pleading is better than bad pleading, and consequently that the abolition of all pleading would be an improvement on the system which has hitherto been prevalent in the practice of the Court of Session.

The other correspondent to whose letter we refer is not only specially conversant with the subject, but is thoroughly in earnest in the opinions which he advocates. The remedy he proposes is the conversion of the Outer House into a Third Division, and the prescription of double hearings of the same case. In the opinion of our correspondent, the Outer House is merely an ante-chamber of the Divisions; the hearing before the Lord Ordinary is a rehearsal, and the decision of the Lord Ordinary no more than an 'interlocutory' judgment, as its name imports. All important cases go ultimately to one of the Divisions; and as the Judges of the Divisions must decide the case according to their views of the law applicable to its merits, it may be presumed their judgment would be just the same if the cases were allowed to come before them in the first instance. The logic of this argument is unassailable; but we should like to know a little more definitely what our learned correspondent wishes to substitute in place of the existing system before giving our adherence to his platform. We have been accustomed to consider that the element to which the Sheriff Court system of practice mainly owes its advantages over that of the Court of Session, is the simple and perfectly adequate machinery which it provides for the hearing of evidence, and for the subsequent disposal of the cause by a judgment settling both the law and the facts applicable to it. The present mode of taking evidence in the Court of Session has not found

a single supporter. Our correspondent, we have reason to know, shares in the general dissatisfaction with which it is regarded. We do not imagine that he would consider a Court of four Judges the best tribunal for trying questions of fact. Yet in three-fourths of the cases brought into Court, the facts—that is, the merits of the case—form the first and most appropriate subject of investigation. If by the abolition of double hearings is meant, that cases are to be thrown headlong into one of the Divisions to be wrangled over on a 'Closed Record,' the prize of victory to be given to the party who tells the most plausible story, with the alternative of a remit to a commissioner (in the not very common occurrence of both parties being found to have stated a 'relevant case'), and a rehearing after two vacations of desultory diets of proof, then we differ *toto cælo* from our esteemed correspondent. If his plan admits of one or more of the Judges from each Division sitting in rotation to try and dispose of cases as they are disposed of in the Sheriff Courts (which, we rather think, is what our correspondent intends), the proposal has much to recommend it. In cases where, but only where, probation is renounced, would we allow the parties to go direct to a Court of several Judges. But if Judges were empowered to try cases without a jury and without issues, we believe that the disposal of cases by trial before a Judge, subject to the review of one of the Divisions, would be adopted in the great majority of cases. The probability of obtaining, under such a system, a judgment settling which party is entitled to the property in dispute, and not a judgment settling which party has employed the cleverest pleader (which the public don't want), would do more to popularize the Court of Session than any improvement that has yet been suggested.

The mode of trial we suggest would work equally well with a Court of two Divisions and supernumerary Lords Ordinary as at present, or with a Court of three Divisions, the Judges trying cases in the Outer House in rotation. The establishment of a Third Division is indispensable, if arrears are to be permanently kept down. Three Divisions sitting with a quorum of *two* Judges, might not offer a spectacle so imposing to the vulgar as the present arrangement; but the decisions of the Supreme Bench would not be less esteemed, though they should want the *imprimatur* of a council of four; nor would the fountains of justice be considered less pure and wholesome, because their supplies were distributed through a greater variety of channels.

The New Law Commissions.—Two very important public questions were, according to the information given to Parliament at the close of last session, referred to Royal Commissions,—we mean the subjects of the Law of Hypothec, and the State of Public Education in Scotland. Both subjects may be admitted to be more suited for investigation by a Royal Commission than by a Parliamentary Committee; the first, because it is a technical question, upon which a body of Commissioners acquainted with the law, and with its practical working, are more likely to form a correct opinion than a Committee of Members of Parliament, not specially conversant with the subject; the second, because the subject is too extensive to be properly investigated within the limited period during which Parliamentary Committees are able to hold their sittings.

No progress, we believe, has yet been made under either of these Commissions. Indeed, we understand that the Commissions have not even been formally constituted, although the names of the gentlemen composing them have been communicated to the public through the newspapers. It would therefore be premature to speculate upon the result of the deliberations of either Commission. Yet, we may be permitted to observe, and the observation is applicable to both bodies, that the weight which is likely to be given to their recommendations will be very different, according to the direction in which their recommendations tend. The complaint which the public have to make respecting the Law of Hypothec is, that it unduly favours the landed interest, by giving the landed proprietor a preference in bankruptcy over the chief part of the tenant's assets at the expense of his other creditors. The Commission which has been nominated for the purpose of inquiring into the grounds of this complaint, is virtually a Commission of landowners, and of persons who, by family or professional connection, are identified with the landed interest. A report in favour of the maintenance of the existing law, if such a report should be issued by the Commission, would carry with it just that degree of authority, and no more, that is due to the opinion of an interested party in favour of his own side of the question. If, on the contrary, the Commissioners, looking beyond the contracted circle of interested opinion, should venture to recommend such a modification of the law as would put the merchant who furnishes the farmer's moveable capital on a footing of equality with the landed proprietor who supplies the fixed capital, the recommendation, emanating from a

Commission of liberal-minded landowners, would operate with irresistible force upon the consciences of less liberal or less enlightened members of the class, and would assuredly pave the way for the abolition of a privilege which the jurist and the political economist must alike pronounce indefensible.

The Education Commission, as we have already hinted, is open to the same kind of observation as the Commission on the Law of Hypothec. The chief obstacles to the establishment of a comprehensive system of National Education are—in England, the Dissenters; in Scotland, the Church. How far it might be prudent or expedient for the latter body to waive its claims to the direction of National Education in Scotland, we do not stop to inquire; nor shall we hazard a conjecture as to the motive of policy which influenced the Government in giving to the adherents of the Church of Scotland a preponderating majority in the present Commission. Among the members who may be supposed to represent the party of the Church, there are, however, some names that are associated with a more liberal, or, let us say, a less exclusive policy than that which has hitherto guided the deliberations of the ecclesiastical corporations on the subject of education; and if the influence of these members, or of their colleagues on the Commission, could be made instrumental in bringing about a more dispassionate mode of viewing what is after all much more a social than a religious question, the Commission will have contributed something towards the solution of the difficult but important problem submitted to their consideration.

Correspondence.

COURT OF SESSION REFORM.

(To the Editor of the Journal of Jurisprudence.)

SIR,—I assume that all the labour and attention bestowed during last year, by the profession, on the proposed reform of the Court of Session, will bear some fruit. I take it for granted that the Lord Advocate still intends to make an endeavour to remove evils that are undoubted; and that, out of the chaos of discordant opinions, contained in the various reports and resolutions of the

professional bodies in Edinburgh and Glasgow, he will extract something that may make the Court of Session popular. I do not wish to dwell upon what, in my opinion, was the mistake he committed. He attempted to frame a code which the professional mind was not prepared for, and which startled and alarmed many persons who did not appreciate the grievances under which we labour, and who had never made the matter the subject of scientific study.

But I think he still further erred, in the direction to which his reform tended. His object was to prevent delay by peremptory orders, and by shortening pleadings. He refused to deal with that which is a greater source of delay,—the radical defect in the constitution of the Court. He seemed in 1863 to think that the time had not come to abolish the Outer House, and to constitute out of the Judges there, a useful Third Division. He took it for granted that he could cure the disease in the old way, instead of boldly fronting the difficulty; and we got his bill, which, if it had become law, would have done immense service, and deserved a better fate. It would have left, however, the ulcer still festering; and, every decade, we would have the same uproar that we have now, with the additional disturbing element of popular clamour. I know no good purpose that the existence of the Outer House serves, either to the profession or to the public at large; and my object now is to state the grounds upon which reform—if there is to be any—should take the direction of abolishing it.

The Court, as at present constituted, has existed from the year 1808. By the Act 48 Geo. III. cap. 151, passed in that year, the Judges were required to sit in two Divisions, in place of the whole fifteen sitting in one Court; and, by the same Act, permanent Lords Ordinary were established. This Act was passed in consequence of general dissatisfaction with the administration of justice in Scotland prior to that time. The subject was considered by a committee of the whole House of Lords in the year 1806, who passed various resolutions, relative to the Courts in Scotland, one of which was as follows:—

‘That it will greatly conduce to the better administration of justice in the Court of Session, and will be for the evident utility of Scotland, that the said Court, instead of sitting in one collective body of fifteen Judges, shall sit in such number of separate chambers as may be found most convenient; and that the Lords, sitting in such chambers respectively, shall exercise the same functions, and

shall enjoy the same authority and privileges as are now exercised and enjoyed by the whole Lords sitting together.'—(*Report of Committee of House of Lords (whole House), ordered to be printed 19th June 1806.*)

The House of Lords did not make any suggestion as to the number of chambers into which the Court should be divided. This matter appears to have been left in the hands of the profession in Scotland; and ultimately it was resolved to have only two chambers, still retaining the Outer House.

After an interval of fifteen years the House of Lords again took up the subject of the administration of justice in Scotland. A select committee was appointed 'to consider of the best means of facilitating the administration of justice as connected with the hearing of Appeals, Writs of Error, and other judicial proceedings.' They returned a Report, which was ordered to be printed on the 17th June 1823, and in this Report it was suggested that the Court of Session should be divided into three Divisions.—(*Report of Select Committee of House of Lords, ordered to be printed 17th June 1823.*)

Since that Report was made, the subject was not taken up by the Faculty of Advocates until the year 1861, when a committee was appointed to consider the matter. That committee, owing, it is understood, to the division of opinion among them, and the different course of reform which the Lord Advocate took, never returned a report. The subject is now, however, more ripe for discussion, looking to the failure of the Lord Advocate's own scheme; and if that committee still remains undischarged, it should perform its duty.

To the public at large the abolition of the Outer House would be attended with incalculable benefits. In 99 cases out of every 100 there is no necessity whatever for a double discussion. If there be proper preparation, the point may be elucidated and disposed of in one debate, before such competent judges as we have, as well as in two. The exceptional hundredth case, involving some novel point of law, some great stake, or the analysis of an intricate mass of evidence, would of course be treated with all the deliberation and the care due to its exceptional character. Legislation is, however, intended for the average cases, and not for the exceptional; and yet the present constitution of the Court is framed upon the theory that every case is a difficult one.

One advantage which would be at once secured would be a speedy judgment. When a case has to run the gauntlet of both the Outer

and the Inner House, we know how many weary months must pass. I recently had occasion in Glasgow to hear mercantile men put the matter thus: 'We cannot afford to have an account open for two years. One half of the money if paid to us now, would be better than the whole, when a final judgment can be obtained from your Appeal Court. Our debtor may be good for six months. To that extent his credit may be guaranteed. He can struggle on for a little, but in two years he may be bankrupt. There is also the chance of his death, or he may be in Australia. What can we do in these circumstances but compromise the dispute at a heavy loss, or endeavour to get our recalcitrant debtor to refer the matter to some brother merchant? That course is often unsatisfactory, and matters are decided not according to legal right, but according to the peculiar notions of expediency of the referee. Now, if you had your judicial force so constituted that we could get judgment within three months from such a tribunal as we could respect, we would soon fill your Court with cases.'

The point is very fairly put when so stated. But there are matters that to the unprofessional mind are unknown. The expense at which a Reclaiming Note, by a debtor fighting for delay, can be put in, is now a mere trifle. The Record is printed in the Outer House; and in order to get a year's grace, all that he has to do is simply to print the Lord Ordinary's Interlocutor and stitch it to the Record.

The public also groan over the expense of the double discussion. It is as expensive to have a debate in the Outer House, as it is in the Inner, and what is it all for? I speak with all the respect due to eminent ability; but the Lords Ordinary will remember their own experience at the Bar—the off-hand way in which their predecessors' long notes were treated in the Inner House. Some of the Inner House judges have read them on the previous evening (a very bad practice), others are taking a glance at them as the debate proceeds, and others get a notion of what they contain from the Bar. I have little doubt that if there were three Divisions, working five days a week, from ten to four o'clock, every case upon the Rolls of Court would be cleared off at the end of each session, with the perfect certainty of abundance of business at the commencement of the next. Can it be doubted that the Court of Session—one of the last national institutions left us by the Union—would at once rise in the respect of the public, and become popular at last?

No such reform, however, as this can be carried without the sup-

port, to a considerable extent, of professional opinion. I now undertake to show that, to all branches of the profession, the change I suggest would be beneficial. Of course, I must appeal here to enlightened selfishness. I begin with the postulate, that what is for the good of the public is for the benefit of the profession. Among my friends of the junior Bar, the proposal in 1861 was received without much favour. They seemed to imagine that if there was only Inner House work, very little of it would come to them. I regard this as an entire mistake. There must be a junior and a senior in every case in the Inner House: Three Divisions working at the same time would spread the business among a wide circle of counsel, and would tend to bring forward young men who now must air their eloquence merely at circuit. It would sooner elevate juniors into seniors. At present the business before the Divisions is in the hands of a few, and these few may also be the seniors and the juniors in every case in the Outer House—to which they may come at their leisure.

To the agents before the Court, the change would work thus: Their accounts for a cause would be sooner closed than they can be now; and they best know the grievous hardship of lying out of their money for years, with the prospect, too, of their client becoming bankrupt or levanting. No doubt they would not have an account for their attendances in the Outer House; but if that account be for business positively mischievous, and which frightens away people from the Court, is it not another illustration of killing the goose? Would they not be repaid ten times over from the greater number of accounts that would follow upon an increase of business? Just observe the working of the system with reference to the last Calling List, which exhibited a greater number of causes than that hitherto meagre document has done for a considerable time. It became generally known that the rolls of the First and Second Division had sunk to a lower amount of causes undetermined than they have exhibited for years. The prospect of a speedy judgment from the Divisions is immediately taken advantage of; and hence the delightful appearance of the Calling List.

I enter into no details. If the idea be carried out into action, the details may be easily settled. But assuredly the Lord Advocate, if he must do something, might spend some profitable time in at least patiently considering a suggestion which may be good, although it was not in his Bill.

From the part I took in the discussions of 1861, my friends at the Bar will know very well by whom this is written ; and I would have put my name to it were it not that I wish the matter considered by the general profession, without regard to the source from whence the suggestion has come.

ALIIQUS.

(To the Editor of the Journal of Jurisprudence.)

EDINBURGH, 14th October 1861.

SIR,—All are nearly agreed as to the necessity of some change being effected as speedily as possible in the procedure of the Court of Session. While I would not wish to disparage the very elaborate attempt to correct that procedure embodied in the late Bill, it occurs to me that a much simpler remedy could be applied ; and many, to whom I have mentioned the plan, concur in thinking that it would meet the objects of the more elaborate measure without calling forth the antagonism which the measure alluded to has done.

It seems not to be unreasonable to hold that those brief forms, which are in every-day use in regard to our lives and persons, should be to some extent available in cases where merely the property of the lieges is at stake. In the Criminal Courts the initiatory writ is served, and, if need be, a special defence is lodged ; but with or without that, a case, which involves much dearer interests than any involved in a Court of Session suit, is brought to a close after one or at most two peremptory diets, without issues or laboured written pleadings, and in a way which involves none of those harassing delays that have rendered the Court of Session so deservedly unpopular.

If, then, as in criminal procedure before the Sheriff Courts, the defender in a Court of Session case were called for two peremptory diets, the first at the end of fourteen or twenty-one days, as at present, and the second at the end of another twenty-one days, a decision could be obtained, in the longest case, in at most eight or nine weeks, and in the general case somewhat sooner. At the first diet let all preliminary defences be disposed of or reserved, without appeal at the time. At the second diet, which should embrace any necessary continuation of days, let any proof necessary be led before the Judge, and the discussion on the merits proceed without intervening delay, and the decision be pronounced forthwith thereafter. From that decision, and all prior ones, appeal by a Reclaiming Note, of

the simplest form, might be allowed to the Inner House; and if power were given to the Inner House Judges to sit individually, if the work, either at first or second diets, or on appeal, required it, all cases, even on Reclaiming Notes, might be disposed of within at most another three weeks from the first decision.

In various articles in your pages you have already disposed of the objections to the want of issues and written pleadings, and to the peremptory diets which my suggestions, equally with the Court of Session Bill, involve. I venture to think there are no other even specious objections to the adoption of the simpler remedy I have indicated, as it would leave the present practice and nomenclature *quoad ultra* untouched; and when it is considered that it could be accomplished by an Act of two or three clauses, embodying and amplifying sections 33 and 35 of the Sheriff Court Act (16 & 17 Vict. c. 80), and that to it the graver objections and opposition called forth by the Bill would not apply, I submit that the remedy I have suggested has advantages which warrant my asking for it the consideration of yourself, and all others who admit the evils of the present system, and are earnestly seeking the best means of their removal.—I remain, your obedient servant,

A PRACTISING LAWYER.

English Cases.

LEGACY.—Testator, by his will, gave a legacy of L.700 to his daughter. He subsequently gave her L.100 as a wedding present before her marriage, and after her marriage he gave her husband L.400. He afterwards made a codicil to his will, and without noticing these gifts he confirmed his will. It was held by the Ld. J. J., affirming a decision of the Master of the Rolls, that the gifts were not an ademption of the legacy; but *dubitante* Lord Justice Turner as to the L.400 gift.—(*Ravenscroft v. Jones*, 33 L. J., Ch. 482.)

CONTRIBUTORY.—Upon a verbal application for shares in a company, the secretary required a deposit, which was paid by the applicant upon a promise of its return if the shares were not given to him; shares were allotted to him, and entered in his name in a book described as a 'Register of the Allotment of Shares.' Notice of the allotment was never sent to him, and his name was not entered in the register of members. Under an order to wind up the company, it was held by the M. R., that the allottee must be put on the list as a contributory.—(*Ex parte Bloxam, in re the New Theatre Co. (Limited)*, 33 L. J., Ch. 519.)

PARTNERS.—The assignees in bankruptcy of A. being about to sell A.'s stock in trade, B., at the request of A. and of A.'s son C., agreed to purchase the same, and to enter into partnership with C., upon the understanding that A. should be engaged as manager of the concern, and give a bond not to carry on

the same kind of business within a limited distance. The bond was given, and an undertaking to employ A. as manager, though not for any definite time, was signed by B. and C., and handed to him; and he was taken into employment accordingly. It was held by the M. R., that there was a good consideration for the bond, and that, notwithstanding the absence of complete mutuality, A. must be restrained from carrying on business contrary to the terms of the bond.—(*Clarkson v. Edge*, 33 L. J., Ch. 443.)

POWER OF APPOINTMENT.—If a power of appointment is exercised in favour of an object of the power, upon the understanding that deeds shall be executed by the appointee, settling the property on persons not objects of the power, in furtherance of the desire of the donee of the power to appoint to those persons, the appointment, although made without any corrupt motive, is void in equity as a fraud upon the power. An appointment to an object of a power upon a bargain to make a settlement in favour of another person, also an object thereof, is valid. (On appeal, from Wood, V. C.) Turner, L. J.: If there is a limited power to be executed in favour of the objects of the power, and there is a belief and intention that so soon as the power shall have been executed the intended appointee will dispose of property in favour of persons not objects of the power, and if, besides the belief or knowledge of such intention, there is a bargain between the donee of the power and the appointee that the appointee shall dispose in favour of persons not objects of the power; and it is the result of the evidence that the execution of the power is the effect and consequence of the bargain, and would not have taken place but for a contract in fact, whether valid or invalid, between the donee and the appointee that it should be made; and it is the true result of the evidence that it would not otherwise have been made at all, then such an execution of the power is bad.—(*Pryor v. Pryor*, 33 L. J., Ch. 441.)

SPECIFIC PERFORMANCE.—Upon sale of an estate the agreement, after fixing a day for completion, provided that if, from any cause whatsoever, the purchase should not be completed on the day named, the purchaser should pay interest from that day until completion. The title shown was bad, and a suit became necessary to rectify a mistake in a marriage settlement before the vendor could make any title. It was held, by the M. R., in a suit for specific performance, that the purchaser was concluded by the agreement, and that he must pay interest upon the purchase-money from the day named in the agreement.—(*Lord Palmerston v. Turner*, 33 L. J., Ch. 457.)

RESULTING TRUST.—Testator gave residuary real and personal estate to an executor, 'to enable him to carry into effect the purposes of the will;' and it was held on demurrer to a bill filed by the heir-at-law, that the executor did not take beneficially, and that, as to the realty not exhausted by the will, there was a resulting trust for the heir-at-law. Wood, V. C.: The general rules of construction I apprehend with reference to this case to be simply three. The first is where there is a gift to A. to enable him to do something, where he has a choice whether he will do it or not, there the gift is for his own benefit, the motive why it is given to him being stated. The second is, where you find the gift is for the general purposes of the will, where the person who takes the estate cannot take the surplus after satisfying the trust for his own benefit. The third is where a charge is created by the will, and the devisee takes the surplus for his own benefit, no trust being implied. The case that appears most to favour the defendant's contention is that remarkable case of *Cary v. Cary* (2 Sch. & Lef. 173), which at first sight seems to be an authority of some weight. It is a dictum only of Lord Redesdale, but a dictum of great weight coming from such a judge. There Lord Redesdale, while holding that a gift of property to a son, in order to enable him to pay debts, created a trust to pay those debts, said at the same time that the surplus, after payment of debts, would remain for the benefit of the son.—(*Barrs v. Fewkes*, 33 L. J., Ch. 484.)

THE

JOURNAL OF JURISPRUDENCE.

THE LONG NEGATIVE PRESCRIPTION AND THE CROWN.

THE law of the Long Negative Prescription is stated in Bell's Principles, § 607, as follows:—"By the lapse of forty years from the day of payment, and neglect during that time to take document upon the debt, without excuse from incapacity or nonage, a debt or right is held to be discharged or abandoned. The words of the first statute are: "That the party to whom the obligation is made that has interest therein shall follow the said obligation within the space of forty years, and take document thereupon. And gif he dois not, it shall be prescribed and be of nane avail, the said forty years being runnin and unpursued by the partie" (Scotch Act, 1469, c. 29). By the subsequent Act, "In time to cum, all obligations made, or to be made, that beis not followed within forty years, shall prescribe and be of nane avail" (1474, c. 55). By the Act 1617, it is declared "that all actions competent of the law on heritable bonds, reversions, contracts, or uthervis' whatsoever, shall be pursued within the space of forty years after the date of the same, except the said reversions be incorporated in the body of the infestment; and that in the course of the said forty years' prescription, the years of minority and lesse age shall in noways be counted, but only the years during which the parties against whom the prescription is used were majors, and past 21 years of age."

By the Act of Union, 6 Anne, c. 26, § 22, the validity or invalidity of the Crown's title to lands in Scotland is to be tried by the Court of Session, 'as was used,' and of right ought to have been by the law and practice of Scotland. The Statute 1617, c. 13, expressly makes the positive prescription run against the Crown; and

Lord Deas in effect said, in the case of *The Lord Advocate v. Balfour*, 12 Dec. 1860, that a good title to lands may be obtained by positive prescription in favour of the subject as against the Crown, and also in favour of the Crown. In Erskine, B. iii., Title 7, § 31, the question is suggested how far the Crown is excluded by the negative prescription, in reference to the title to a heritable subject. And since Erskine's time the question has been raised, but not decided in several cases, whether the long negative prescription runs against the Crown (*Commissioners of Annexed Estates v. Sir R. Menzies*, 15 Dec. 1773, M. 7860; *Her Majesty's Advocate v. The Magistrates of Stirling*, 5 Feb. 1846, 8 Court of Session Reports, 454; *Earl of Fife's Trustees v. The Commissioners of Woods and Forests*, 28 Feb. 1849). It does not appear that any question has yet been raised as to the application of the shorter prescriptions by or against the Crown; but it deserves to be noticed, that while Mr Broom refers to the *Jus devolutum*, in illustration of the maxim, '*Nullum tempus occurrit regi*,' and asserts that the Crown does not forfeit its right of presentation through the neglect of its officers to present within the appointed time (Law Maxims, p. 63), it was, on the contrary, laid down by the judges of the First Division in the South Leith case, 2 Macph. 469, that the *jus devolutum* might be claimed against the Crown to the same extent as against a subject-patron. The cases to which reference has been made were all cases connected with heritable title, and so were tried in the Court of Session. It is mentioned in the report of the cases of the Magistrates of Stirling and of the Earl of Fife, that it had been frequently decided in the Court of Exchequer that the negative prescription did not run against the Crown.

The revenue statutes impose taxes and duties in two ways. By one mode, the statutes prescribe that the revenue officers shall assess and charge the taxes on the persons liable,—as, for instance, the assessed taxes and income tax; and by the other mode the statutes lay the obligation of ascertaining and paying the duties on the tax-payer. Of the latter kind are stamp duties generally, and among them the inventory and legacy duties. An executor or person intromitting with an estate of a deceased person is required to exhibit in the Commissary Court an inventory duly stamped of the estate. Within a certain time after an executor pays a legacy, he is required to prepare a schedule, and pay the duty on it to the revenue officer.

The long negative prescription, by the old statutes quoted, applies to obligations, heritable bonds, reversions, contracts, and others whatsoever. It does not appear that either of the kinds of taxes falls within the words describing the documents to which the negative prescription is to apply; but especially is this true of the second kind, where the omission or neglect to ascertain and pay the duties is with the taxpayer, not with the revenue or its officers. But more particularly may it be held, that the Crown taxes are not within the written obligations, 'or others whatsoever,' to which the prescription statutes apply, when the Queen is not mentioned in these negative prescription statutes, and is expressly mentioned in the positive prescription statute.

But the rights of the Crown in reference to duties, such as inventory and legacy duties, are not to be judged of in the Court of Session, where the Crown's heritable titles and rights are to be adjudicated, but in the Court of Exchequer, which is an English Revenue Court in Scotland, established by the 6 Anne, c. 26; and by the Act 19 and 20 Vict. c. 56, § 1, the Court of Session is constituted the Court of Exchequer in Scotland. It is apprehended that the rights and prerogatives of the Crown as regards the revenue must be judged of in the Court of Exchequer by English law and practice; and therefore the maxims, '*Nulhum tempus occurrit regi*,' and 'the Crown is not hurt by the laches of its officers,' will be applied as in England. From the argument of the appellant in the case of *Carruthers v. Lorimer*, House of Lords, 1860, 3 Macq. 827, and also from the judgments delivered by the Lord Chancellor and Lord Kingsdown, it would appear that neither acquiescence nor lapse of time would be any bar to proceedings by the Attorney-General or Lord Advocate.

INFANTICIDE IN ITS LEGAL RELATIONS.

THE history of infanticide has been ably summarized in Beck's *Elements of Medical Jurisprudence* (sixth edit., London, 1838, pp. 209 *et seq.*); and from the authorities quoted in that work, we may trace the prevalence of the practice of child-murder amongst the principal nations of antiquity. How common it was in the different states of Greece—with the single and honourable exception of Thebes—the Greek historians themselves inform us. And in one state at least, that of Sparta, the exposure on Mount Taygetus of all children

who at their birth appeared either sickly or malformed, seems to have been not only permitted, but commanded (Beck, p. 210; Smith's History of Greece, p. 66). Amongst the Romans the laws of Romulus and of the Twelve Tables (Montesquieu, De l'Esprit des Lois, liv. 23, chap. 22 ; see also Cicero, De Legibus, iii. § 19) allowed the turning adrift or putting to death of all children whom the circumstances of their parents did not permit them to rear ; and so firmly rooted in national prejudice does this custom appear to have been, that we hear of its existence in times so late as the age of Constantine, one of whose most celebrated statutes was passed on this subject (Gibbon, Decline and Fall, ii. p. 142) ; nor can it be said to have finally disappeared till expelled by the humane influence of Christianity, in the reign of the Emperor Valentinian I. (Gibbon, Decline and Fall, iii. p. 247 ; Penny Cyclo., art. Infanticide). But although the frequent references made to this barbarous custom by the classical authors have rendered it more familiar to us as a Roman institution than in connection with any of the other states of Italy, there can, we think, be little doubt that the practice was common through the length and breadth of the peninsula ; and notably so in such of the neighbouring tribes as possessed institutions analogous in their nature to the *patria potestas* of ancient Latium. Amongst the Sabellians, for instance, from whom it is not unlikely that the Latins derived the custom, its existence may safely be assumed ; and though, perhaps, on account of their Celtic origin, no traces of it have, so far as we are aware, been as yet discovered among the Etrurians, the point cannot be held to have been placed beyond the reach of doubt. It is a by no means uninteresting fact, and one which admits of a perfectly satisfactory explanation on physical grounds, that amongst the ancients at least, infanticide appears to have prevailed to the greatest extent amongst southern or eastern nations dwelling in hot climates, while it seems to have been hardly known to the inhabitants of more temperate zones. Thus, while, in addition to the instances we have mentioned, we have proof of its existence amongst the Persians, Hindus, Phœnicians, Carthaginians, Peruvians, and Mexicans, we learn from Tacitus (Montesquieu, De l'Esprit des Lois, liv. 23, chap. 22 ; Tacitus, De Morib. Germ. c. xix.), that among the Germans it was unknown, and certainly no traces of it are to be found amongst the ancient Britons.

The more modern history of child-murder is unhappily no less extensive in its range than the ancient. Indeed, it would almost

seem as if infanticide were a practice which resists the ameliorating influence of civilisation, prevailing as it appears to do in the nineteenth century *after*, to as great an extent as in the eighth century *before*, Christ. In some nations the custom has never been abolished, as, for instance, among the Hindus, where it has been known for the last two thousand years, and where, even under British rule, female infanticide still prevails in the Sooradah and Jeypore districts of Khordistan (A Personal Narrative of Thirteen Years' Service amongst the Wild Tribes of Khordistan, for the Suppression of Human Sacrifice, by Major-General John Campbell, C.B.; London, 1864, p. 125); while the murder of male children still lingers among the remote hills of Chinna Kimedy (*ibid.* p. 147). In Cutch and Guzerat, in 1807, female infanticide prevailed to the extent of 3000, some say 30,000, annually; and in China the practice is both very ancient (Nat. Riccius, *Expedit. in Sinas*, lib. i. c. 3), and almost universal (Beck, p. 207). One traveller, Mr Abeel, states that in some provinces not one female infant out of three is suffered to live; and that in others the difference between the male and female population is one to ten. At Amoy the practice was observed by Mr Gutzlaff. At Pekin, Barrow estimated the inhuman mortality at 9000 children a year; Lord Macartney reckoned it at 20,000; while Gibbon (*ii.* p. 201, note), on the authority of Le Comte, limited the number to 3000. But though Ellis, in 1816, doubted the existence of the practice altogether, it is beyond all doubt that it still continues in full vigour. It is but fair, however, to add that a Chinese law does exist, whereby the wanton murder of a child is punished with 100 blows. (Beck, p. 318.) That it existed during the middle ages in Japan, we have the authority of the Jesuit Gaspar Vilela for stating (*Epist. Japon*); but if still extant, it is by no means of such common occurrence as formerly,—the peculiar legislation of that people as to prostitution probably rendering it unnecessary. Amongst other nations, again, it seems to have sprung up with civilisation. We are told by Strabo that it was unknown to the ancient Egyptians, but it is stated by Hamont (*Annales d'Hygiène*, x. pp. 202–3) to exist among their descendants; and as the increasing knowledge of geography and ethnography discovers to us new races and peoples, it also opens our eyes to the further existence of this inhuman custom. It has been found in Otaheite, the South Sea and Sandwich Islands, New Zealand, New South Wales, South Africa, and even in Hudson's Bay, Labrador, and Iceland. It is

distinctly to be observed, however, that in the greater part, we may almost say all the cases above given, child-murder stands on a very different footing from that in which it does amongst ourselves and other civilised nations. In the instances we have mentioned, infanticide appears as a *practice*, not as a *crime*. There is nothing criminal in its commission—nothing that inspires horror, or is held to have deserved reprobation. A national custom, if not actually enjoined, it is at least not prohibited. Herein lies the difference between infanticide as it appears in half-civilised and altogether heathen peoples, and as it appears in wholly civilised and christianized nations; and this must never be lost sight of in our consideration of the subject. From our knowledge—scanty as it is—of the laws of the different peoples of Europe during the middle ages, we can distinctly trace the gradual change of public opinion in this matter. Beck (p. 318), quoting from Denham's *Europe in the Middle Ages* (vol. ii., Gardner's Cabinet Cyclopædia), gives several instances which may illustrate this observation. Thus, as a crime, the Germanic nations of the middle ages early attached the punishment of death to the murder of a new-born child. Amongst the Lombards of the twelfth century, the same rule held good. The wretched mother was buried alive, with a stake thrust through her body. In Saxony, we learn from the *Specimen Juridicum* (p. 44), she was sewn up in a sack along with a viper, a monkey, and a dog,—a striking illustration of Mackenzie's doctrine, that infanticide is a species of parricide (*Criminal Laws of Scotland*, xiv. 7, Works, vol. ii.); and in Siberia and Lusatia the Lombard custom was followed. Foderé (iv. 396) tells us that the Emperor Charles V. condemned the mother to death when it was proved that the child had been born alive; and Professor Bernt (erroneously given 'Bennet' in Arrowsmith's *Thesis on Infanticide*, p. 6) adds, that the child was held to have been born alive on the fact of delivery being ascertained by inspection of the breasts and parts of generation of the mother by an experienced and sensible woman; whilst Boher (*Dissert. binæ de partu executo*, p. 336) further informs us that a suspicion of infanticide from concealed birth subjected the unfortunate woman to the rack to extort confession. In France, again, the well-known Act of Henry II., passed in 1556, and cited by Domat, and to which English law owes the statute 21 Jac. I. c. 27—to be afterwards adverted to—condemned to death every woman convicted of concealment of pregnancy, and who had put to death her

bastard child (Taylor on Evidence, i. p. 118, note). This law, Foderé states (iv. 365), prevailed till 1791, when 'everything relating to the concealment of pregnancy was repealed; but the punishment of death still continued for the murder of the child' (Beck, p. 318).

Descending to modern times, we find the French penal code of the empire (Art. 302) prescribing death as the penalty of the murder of a new-born child, whether the death arise from violent means or from wilful exposure (Art. 301). In Austria (Colquhoun, p. 66), exposure, whether followed by death or not, infers merely the penalty of imprisonment for not less than eight nor more than twelve years; but this is liable to be increased under circumstances of aggravation. The Prussian law, again, according to Casper (Handbook of Forensic Medicine, translated by George D. Balfour, M.D., New Sydenham Society, 1864, vol. iii. p. 2), enacts, that 'if a mother intentionally kills her illegitimate child either during or immediately after its birth, she shall be punished for the infanticide by imprisonment in bridewell for from five to twenty years. But if the child has been intentionally killed by any person other than the mother, or if any other person has assisted in the crime, then the ordinary statutes against murder, homicide, or participation in such cases become applicable' (Prussian Penal Code, Art. 180). Few of the codes of modern Europe are so deserving of study for the humanity and wisdom of their provisions as this. In America generally there is no special law on the subject of concealment of pregnancy; but infanticide in almost all the states is murder at common law (Beck, p. 319). Concealment of pregnancy there is by no means so aggravated an offence as it is on this side of the Atlantic. Nay, Mr Hills, in his work on Circumstantial Evidence (p. 206), seems almost to think it justifiable in some cases. 'It may proceed,' he says, 'even from meritorious motives, as when a married woman resorted to such concealment, in order to screen her husband, who was a deserter, from recovery.' Messrs Wharton and Stillé (Medical Jurisprudence, p. 790, § 1218) sum up the American law on the subject in four propositions, of which the substance may be said to be, that malicious wounds upon, or the malicious exposure of, an infant, with the intent to produce and followed by death, will subject the offender to capital punishment; that exposure without intent to produce, but followed by, death, will infer the penalties of manslaughter; but that when the exposure is the result of necessity,

ignorance, or insanity, even though death should ensue, 'the offence is excusable homicide, in which, in accordance with an American practice, the defendant is entitled to an acquittal.' How far the leniency of this provision is justifiable on the two first of these defences, is a question which American legislators have apparently not thought it necessary to decide. We may notice briefly the more important of the penal state laws on this subject. The authorities will, for the most part, be found in Beck, pp. 210, 211. In the states of New York and Massachusetts infanticide is wilful murder at common law. In Vermont the murder or concealment of a bastard was, by a law passed in 1797, but now repealed, a capital offence. In Pennsylvania, by an Act of 1781, concealment of death was held conclusive evidence to convict for murder; but this enactment has been altered by subsequent laws, to the extent that wilful and malicious destruction of the child requires to be proven,—a regulation which also prevails in Rhode Island. In New Jersey, New Hampshire, Michigan, and Connecticut, concealment of pregnancy is a misdemeanour, and punishable with fine and imprisonment; whilst in Georgia and Illinois the concealment of the death of a bastard is punished by imprisonment.

Passing to England, the first statute which demands our attention is the celebrated Act 21 Jac. I. c. 27, whose origin, as already noticed, is to be attributed to that of Henry II. of France on the same subject. By the statute of King James it was enacted, that if any woman was delivered of a child, which, if born alive, would have been by law a bastard, and endeavouring privately to conceal its birth, by burying the child or the like, the mother so offending should suffer death, as in the case of murder; unless she could prove, by one witness at the least, that the child was actually born dead. This 'remarkable instance of presumption of guilt,' as Mr Taylor (*Evidence*, i. p. 118, note) calls it, has been reprobated by the most distinguished authorities in England in the strongest terms. That it was an 'unreasonable and barbarous rule,' is admitted by the authors just cited; and Stephens, in his *Commentaries on the Laws of England* (vol. iv. p. 364), quotes with approbation Blackstone's account of the Act (*Commentaries*, vol. iv. p. 193), in which he says, that 'though it savours pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, it is nevertheless also to be met with in the criminal codes of many other nations of Europe,—

as the Danes, the Swedes, and the French ;' and Mr Matthew Bacon, in his admirable 'Abridgment of the Law' (vol. i. p. 773), coincides in the prevalent opinion as to its severity. Nor is medical testimony wanting to the 'extreme harshness and cruelty of the statute,'—we quote Grey's words (Forensic Medicine, p. 75). Dr Perceval, in his 'Medical Ethics' (Manchester, 1803), thinks that, 'though humane in its principles'—we suppose he means the grounds on which it rests—the Act is 'much too severe in its construction ;' while it is well known that, under the influence of that injustice, Dr William Hunter, in 1783, wrote his celebrated 'Essay on the Uncertainty of the Signs of Murder, in the case of Bastard Children' (Grey, *ut supra*). Dr Hunter's essay will be found in the 'Medical Observations by a Society of Physicians in London.' A fair abstract of its chief conclusions is given in Burnett's work on Criminal Evidence, p. 572. It is to be observed, that the Act thus generally reprobated, applied only to bastard children. What would have been the course pursued by the Court in reference to legitimate children, we are left to presume. It is to be noticed, too, that barbarous and cruel as the rule appears to have been, it is by no means astonishing that regulations such as it contained were at that time common in other countries besides England ; nor that they should be copied, as they afterwards were, into the legislative systems both of Scotland, Ireland, and America. The Act, in fact, was one of those triumphs of short-sighted and unreflecting legislation, which, by a show of vigour and energy, strongly impress upon public opinion ; and which—temporarily effectual to check a growing evil as they may possibly be—can only be defended in after years on the ground of present emergency and danger. That such an Act could not continue to be permanently the law of England is undoubted : the wonder is that it remained in force so long as it did ; for it was not till the year 1803 that any attempt was made to modify any of its provisions. By the 43 Geo. III. c. 58, however, the obnoxious Act of James I. was repealed, as well as that of 6 Anne, c. 4, by which it had been extended to Ireland (Hutchinson on Infanticide, 1830, p. 97) ; and the law was then fixed to be, that trials for the murder of illegitimate children should (§ 3) be conducted by the same rules of evidence as ordinary trials for murder ; but that (§ 4) if the person should be acquitted for the murder, it should be lawful for the Court to convict her on the

alternative charge of concealment of birth, implying the penalty of imprisonment in a House of Correction for not less than two years. The consolidating Act of 9 Geo. IV. c. 31, § 14, relative to offences against the person, continued the provisions of the Act of 1803, merely denominating the crime of concealment of birth as a misdemeanour; but making no other change of consequence, further than by abolishing the distinction between legitimate and illegitimate children. But this again was repealed by 24 & 25 Vict. c. 95, 6th August 1861; and the law finally fixed by 24 & 25 Vict. c. 100, § 60. This Act, which, like 9 Geo. II. c. 31, places the crime of which we are speaking under the head of 'offences against the person,'—though, as Mr Stephen well observes (*Commentaries on the Laws of England*, vol. iv. p. 364, note), 'the secret disposition of the dead body of a child alone, unconnected with violence done to it when living, does not seem to be naturally and satisfactorily described as an "offence against the person,"'—enacts, that 'if any woman be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child (whether such child died before or after its birth), endeavour to conceal the birth thereof, shall be guilty of a misdemeanour, and be liable to be imprisoned, with or without hard labour, for any term not exceeding two years: provided that, if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the Court may pass such sentence, as if such person had been convicted upon an indictment for the concealment of the birth.' The English law, therefore, as it at present stands, is, that the murder of a new-born child, legitimate or illegitimate, infers, like every other murder, capital punishment; but whilst the old law, from an accusation of concealment of birth, could deduce a charge of murder, the modern law can only deduce the charge of concealment of birth from an accusation of murder.

What was the practice of the Scotch Courts before the passing of the well-known Act of 1690, we know from the records of trials, and the works of our institutional writers. Child-murder was an offence at common law, and punishable with death. A woman who had born a bastard, and had concealed her being with child, was

guilty of parricide if the child was found dead, and punished, unless she could prove that the child was born dead, by some extraordinary punishment, but not by death (Sir George Mackenzie, Works, ii.; Criminal Law of Scotland, xiv. 7). 'Thus,' says Sir George Mackenzie, 'it was decided in Savoy, 1595 (see above, p. 534), (*ad Cod. Fab. de hic qui parent. occid. Def. 11*); and with us *Lawson* and *Ramsay* were both scourged, *annis* 1661 and 1662, even though they were assoilzied from the murder. But I think this was severe,' he continues, 'if the woman openly acknowledged that she was with child, though none was present when she brought it forth.' But this state of the law must have been insufficient to put a stop to the increasing prevalence of the crime. Accordingly, between 1660 and 1690, we find 'juries, in many instances, though not invariably' (Hume, ii. 291), presuming murder from concealment of pregnancy; and Fountainhall (10 March 1679) reports the case of *Smith*, a midwife, and her servant, *Scot*, who were convicted of murdering a child in respect of 'pregnant suspicions of them.' 'And it were to be wished,' he adds (*ibid.*), 'that we had such a statute made with us, as I find that they have in England, viz., 27 Act, anno 21 Jacob. I.: That it shall be murder for the mother not to call for help, or to conceal the death of her bastard child; which would prevent exceedingly the destroying of children, if these *violent presumptions* were once made enough.' Numerous cases occur (Hume, ii. 292) about this time of convictions of murder on presumption only: such as *Bessie Brebner*, 17 July 1663; *Margaret and Agnes Taylor*, 24 June 1663; *Margaret Black*, 1677; and Hume refers also to that of *Janet Brown*, June 1614, who was convicted of child-murder, in respect she went out to the fields, and so neglected the ordinary help for being delivered. At length, however, chiefly owing to the alarming number of cases occurring, in January 1681 an Act was passed in the first Parliament of William and Mary (1690, c. 21), in which, on the preamble of the 'frequent murders committed on innocent children by mothers concealing their being with child, whereby the new-born child might be easily stifled, or left exposed in the condition in which it comes into the world,' it was statute, enacted, and declared, 'that if any woman conceal her being with child during the whole space, and shall not call for and make use of help and assistance in the birth, the child being found dead or amissing, the mother shall be holden and reputed the murderess of her own child;' ordaining, at the same

time, all criminal judges to sustain such process, 'though there should be no appearance of wound or bruise on the body of the child' (*Isabel Kilgour*, July 1754. Arnott, No. 64). The convictions which followed upon the passing of this statute—'the only instance,' says Burnett (p. 570), 'where the Legislature has interfered in pointing out to a jury what circumstances should be held sufficient to incur guilt'—were numerous, and in most cases the capital punishment was rigorously executed; and even in circumstances where the fact of revelation was proved, the arbitrary punishment which followed was often no less severe than that appointed by the statute for the unrevealed crime. (See the celebrated case of *Margaret Dickson*,—'half hangit Maggie,'—July 1724, Arnott, Criminal Trials, No. 37. In this case, the defence that the Act was applicable only to unmarried women was repelled.) In others, again,—for example, in *Elizabeth Orrock*, 21 Feb. 1715, and *Elizabeth Johnson*, same date (Arnott, Crim. Tr. p. 71), the penalty was limited to scourging. But the practical working of the law was far from satisfactory. 'Such, indeed,' says Hume (ii. 292), 'was the facility of conviction laid open by the statute, that it at one time betrayed both prosecutor and judges into a degree of slovenliness and indecent haste in trials for child-murder, to which I find nothing to be compared in any other portion of our criminal proceedings. Of this I need mention no stronger illustration than the practice, which was far from uncommon, of carrying on several trials for child-murder in one sitting, and with the same assize, who enclosed and returned their verdicts, *simul et semel*, on the several indictments.' (In illustration, Baron Hume cites the cases of *Bessy Turnbull*, *Isabel Taylor*, and *Margaret Inglis* on 3d March 1709, each for murdering her child, sent to one assize, who convict two of them.) By degrees, however, so great a laxity of practice crept in, that in *Janet Heatly*, 3 March 1761 (Arnott, No. 71), it was argued for the prisoner, that it had always been reckoned hard to convict one in her unfortunate situation merely upon the statutory presumption, and that for many years a proof of actual violence had been required; and in a murder trial in 1722 (note to *Heatly's* case, Arnott, No. 71), in which this Act was mentioned, it was pronounced 'a hardy and dangerous law, upon which, it is generally believed, more innocent persons have died, than ever did upon any statute.' (The trial referred to is *Troublecock*, Arnott's Ancient Criminal Trials, No. 35.)

The last conviction under the statute was *Ann Muckie*, 5 August 1776. Hume observes, 'After that time, in cases of libel laid on the statute only, and where the circumstances were anywise favourable to the pannel, it became usual for the prosecutor to consent to her petition, praying to be banished forth of Scotland, or for some other inferior pain. To correct this, as it was deemed, too lenient course of practice, and yet avoid recurring to the rigour of the Act 1690, it was thought advisable to repeal that statute, and to substitute in its stead a qualified and a more temperate enactment.' Burnett, p. 571, attributes this 'too lenient course of practice' to compassion for the mother, and the 'difficulty of establishing the *corpus delicti* from the appearance of the woman and the dead body of the child,' when put against the presumed natural affection of the mother. This was the Act 49 Geo. III. c. 14, which, after stating that 'the punishment of death has been found too rigorous for such an offence, i.e. concealment of pregnancy ("certainly," adds Burnett, p. 571, "not too rigorous for child-murder"), provides, that if any woman shall conceal her being with child during the whole period of her pregnancy, and shall not call for and make use of help or assistance in the birth, and if the child be found dead or be amissing, the mother being lawfully acquitted thereof, shall be imprisoned for a period not exceeding two years.' This is the existing statute. 'Under it,' Mr Steel thinks (*Powers and Duties of Juries in Criminal Trials in Scotland*, 1833, p. 100), 'these facts—viz., the circumstances enumerated in the statute—are not considered as presumptions of murder, but as being *in themselves* a crime,—a species of culpable homicide, implying the death of the child, through criminal neglect of its safety at the birth.' But this, especially when had in connection with the history of previous legislation on the subject, is perhaps rather a questionable doctrine; and it would appear to be more correct to hold, in the words of Mr Gillespie Dickson (*Treatise on the Law of Evidence*, new ed. § 295. See also Alison, *Principles*, p. 153, and authorities there quoted), that the 'statutory crime of concealment of pregnancy involves the presumption, *juris et de jure*, that a woman who conceals her condition from every person, and does not call for help at the birth, had a criminal indifference about the fate of her child.' We would certainly not be supposed to go the length of meaning that there is anything like a *presumption of murder* in the statutory regulations on the subject of concealment of pregnancy; but it

would seem to be the design of the statute to punish the crime, not so much from the criminality of the 'facts' themselves, as of the criminality of the intention which prompted the commission of these 'facts.'

From the brief historical sketch which we have thus given, it will be seen that, notwithstanding a slight discrepancy in the terms employed, the difference between the laws of England and Scotland on the subject of child-murder is technical rather than practical. Theoretically, the two systems may be regarded as identical. Roughly speaking, they proceed upon the same general principles, and arrive, though perhaps by somewhat different routes, at the same broad conclusions. In both schemes of legislation, infanticide is regarded as murder at common law, and in both an alternative charge is included in an indictment for child-murder. But in the one case, this alternative charge is that of concealment of birth; in the other, it is concealment of pregnancy. Hence arises a practical diversity in the nature of the evidence adduced,—a diversity more important, perhaps, in a medical than in a legal point of view (Dickson on Evidence, §§ 7 and 295; Taylor's Medical Jurisprudence, p. 378).

That the law thus explained is by no means satisfactory, either as regards the requirements of justice, or in connection with the proportionate guilt of the offence, is an opinion coincided in by both the medical and the legal professions. It is needless to multiply authorities for this statement (see, however, the *Journal of Jurisprudence* for January 1859; and Guy, Forensic Medicine, pp. 75 and 113). To do so, would occupy more time and more space than is at our disposal. In the last number of *Blackwood's Magazine* (November 1864), the writer of the paper entitled 'My Latest Vacation Excursion,' describes what he calls 'a very startling phenomenon—one that would be made to ring throughout Europe if it occurred among ourselves. . . . It was in the penitentiary for women at Prague. One of the Sisters of Mercy who tended it, spoke much of the *kinder morderinn*, or child-murderers, as belonging to an important and conspicuous class, and was anxious to know if it was a very numerous one in Britain. I found that of the 400 women under her charge, 130 had been convicted of child-murder—thirty-two and a half per cent.!' We conclude this paper by quoting the able words of Mr Fitzjames Stephen on this subject (General View of the Criminal Law of England,

1863, p. 122), in whose sensible suggestions for the amendment of the law we are sure every person who carefully considers the matter will agree. 'A large proportion,' he says, 'of the murders committed in England falls under this head. They are cases in which a woman kills a new-born child for the purpose of concealing its birth. The pain, distress, and shame, under which the mother of a bastard child labours at the time of delivery are such powerful inducements to crime, and in themselves produce so much sympathy for her, that capital convictions hardly ever take place under such circumstances; and sentence of death has not, I believe, been executed for a great length of time. The prisoner is almost always convicted of the misdemeanour of concealing the birth, or at most of manslaughter. In the first count she is subject to a maximum punishment of two years' imprisonment and hard labour. In the second, the jury, from motives of pity, strain the law, which is a fresh evil. It might be made a specific offence for the mother of any new-born child to kill that child with intent to conceal the birth, and the offence should involve liability to the maximum of secondary punishment. If this course is not taken, the punishment for concealment of birth ought to be increased, so that something like an adequate punishment might be inflicted for the murders which are called by that name.' In addition to these admirable remarks, we would only direct the attention of the profession to the extremely satisfactory nature of the provisions of the Prussian law, already cited, in relation to this crime (*supra*, p. 535).

'LE LIBRE TRAVAIL OU ABOLITION DES BREVETS.'

ABSTRACT OF AN ESSAY ON THE LAW OF PATENTS, BY P. VERMEIRE.

THE author explains, in the preface to his pamphlet, that he had been commissioned, under the authority of the Belgian Government, to report upon a project of law relative to models and designs for manufactures, which was then (November 1861) under discussion in the Belgian Chamber of Representatives. He was led by this circumstance to devote more special attention to the policy of the Patent Laws; and the result of his investigation is communicated to the public in the essay under consideration, in which he proposes to show that intellectual labour cannot legitimately be invested with the rights of property, unless its results are embodied in a material

form: in other words, that the State cannot, or at least ought not, to recognise a right of property in the ideas which constitute an invention, or a work of literature, although it may protect the inventor's property in the particular mechanism, manuscript, or printed or artistic matter in which that idea is embodied. A considerable portion of the essay is occupied with the refutation of the arguments of other jurists who have written in opposition to the author's views. Omitting the controversial part of the essay, we propose to offer, in a somewhat abridged form, an account of the author's very interesting argument upon the question of the State protection of inventions and literary property.

After investigating the idea of property according to the views generally received among political economists, the author proceeds. It has been said, 'An idea is property as much as a house;'¹ and upon the basis of this principle, measures have been prepared recognising not only the temporary rights of property in the expression of thoughts, but rights perpetual and hereditary. However, there is nothing more debateable than the proposition which we have just cited.

That an idea *is* property like a house, is a proposition true in a certain point of comparison, but it is completely false if taken in an absolute sense.

It is generally admitted, that what constitutes property is value; that value has its source in labour, and that labour of whatever kind proceeds from an active force, which in every instance is intellectual. A house may then be assimilated as the subject of property to an idea, since it represents the labour, which is the idea in action; or, to express the matter more clearly, the property of a thing being based upon the intellectual principle, may be assimilated by way of extension or comparison to an idea, which is the principle itself.

But there is a wide difference between an idea in its purely metaphysical state, and the product of an idea applied to matter. It is one thing the idea of making a house, the conception of the plan, of the construction, of the form, of the colours; it is quite another to apply the idea to the conversion of the building materials to that purpose, and the execution of the details of their erection, their position, their shape, and their ornamentation.

It results from this demonstration, that the property of a subject being intellectual in its origin, stands in an intimate relation to the

¹ Letter from Napoleon III. to Jobard.

idea of it ; but it results from the same consideration, that the one is distinct from the other. The property of a house is the product and result of intelligence, whilst the property of an idea is the property of intelligence itself. This distinction is as cardinal as that which exists between the property of a photograph and the property of light. A photographic image is the product of the solar light, as a house is the product of human activity. The image has its proprietor ; but there is a wide gulf between the property of a photograph, and the property of the light which produces it.

The term 'property' implies the idea of possession ; but possession does not imply the idea of property. In other words, that which is the subject of possession is not necessarily denominated property. In order that possession may be property, it is necessary that the subject possessed is not, and cannot be, under the dominion of all. Light, for example, which is an element diffused through all nature, is a subject which all possess, and which has never been denominated property.

The man who imagined to make a bow and arrows, and who made them, possessed at the same time the idea of making these implements, and the implements themselves. The bow and the arrows were his property, because they belonged to him alone, and because to deprive him of them would have been to commit a theft, punished by every society not communist. Can the same thing be said of the idea which is attached to the fabrication of the objects which we have taken for an example ? Is it not possible that another person should come into possession of this idea without taking it from him who had first conceived it ? Clearly it is.

Inventive thought comes, we know not whence, if it is not indeed an inspiration flowing from the Supreme Being ; and the same idea may spring up in a thousand brains at once, and in millions of brains during the elapse of a certain space of time.

The man who had made a bow might have said : This bow which I hold is mine, and belongs to nobody but me. Possession of this nature was called property. But he could not say : The idea of making a bow is mine, and nobody may possess it unless he robs me of it. Accordingly, the legislators of society, up to the time when the sophistry of civilisation had succeeded in obliterating the common sense of the people, took good care not to give the name of property to an idea, and still less to stigmatize as a thief the man

who thought as another man. All positive religions, as well as natural religion, condemn the theft of a thing which is the tangible property of an individual ; but no moralist has stigmatized the profit which society draws from invention, in appropriating its expressed ideas.

Was it ever heard of, that they should be called thieves who armed themselves like the first inventor of the bow ; who clothed themselves like the first man ; who had the idea of covering himself with skins or with clothes ; who fed themselves on animal diet after the example of the first man that refused to be satisfied with the fruits of the earth ; who constructed habitations, in imitation of the man to whom that notion first occurred ? Is he a thief who enriches himself with the virtues of others, or he who picks up in conversation a phrase or a word serving as the subject of discourse, or he who furnishes his mind with observations and studies due to another intelligence than his own ? Is he a thief, who travels through foreign lands to study the manners, the laws, the industry, and the commerce of the inhabitants, and who seeks to prosecute in his native country the knowledge he has acquired in his peregrinations ? No. The action of thought itself everywhere proclaims the community of thought as an inherent law of intelligence, as the vibration of the luminous ether diffuses through space the community of light as an essential condition of the fluid which illuminates nature.

The preceding arguments might have sufficed for the disposal of the question of natural right, which is the foundation of the argument for protection ; but since right is appealed to upon other grounds, by those who maintain the property of ideas, let us inquire what is the value, in a philosophical sense, of this right, of which so great a use is made in the argument.

The first object which attaches to the property of ideas is the faculty of thought itself. This faculty pertains to every being endowed with a soul. Every man, therefore, *possesses* the faculty of thought, and that in a manner even more evident than he who possesses a house ; for the possession of a house is subject to disputes, is limited by time, and is liable to be destroyed by a thousand physical causes, while the thought, being the man himself, cannot be taken from him.

Nevertheless, a person possessing a house is called *proprietor*, while he who possesses nothing but his thoughts is not so. Let us

observe here, that the whole logic of the question lies in this distinction.

The advocates of property in ideas wish to change the meaning of language, and to give the name of proprietor to the possessor of a thought, as the name is given to the possessor of a material object susceptible of valuation; and it is this ambiguity, or rather the confusion of the words ‘possession’ and ‘property,’ which has given birth to the remarkable doctrine of the property of ideas. This is so much the case, that many distinguished minds, confounding possession with property, allege that property in ideas is better founded than the property called material, since we are in possession of the ideas which are within us more truly than we possess the objects of the outer world.

If the doctrine of the protectionists of labour were confined to the remodelling of language, it would be wholly inoffensive. Unfortunately, they carry it much farther. They profess not merely to leave to every one his faculty of thinking, as one leaves the proprietor his house, but they seek to interdict the rest of the community from thinking like those who are entitled authors, artists, inventors,—and consequently to prevent them from applying that manner of thinking to matter.

The first serious application of thought in relation to the physical world is the vibration of the air produced by its utterance in speech. Language being the primordial manner of causing thought to react upon the world, it would then have been the first subject of property if language had been born under the law of our philosophers—a law which these persons allege to flow from the eternal principles of justice. After spoken language, we come to language or ideas in writing—to ideas carved, designed, or painted, in which thought, in place of acting by the agency of the vocal organs, puts in movement some other part of the human mechanism; and in place of acting upon the physical world by the mere vibration of the waves of sound, traces lines, figures, and colours upon matter, or it may be moulds, fuses, and transforms it in a thousand designs.

Thus everything which is derived from human action is an emanation of thought; and consequently, everything which has been produced by man should have fallen under the application of the law of property in ideas. Would the philosophers of the nineteenth century wish to reconstruct society, basing it upon the principles which they have placed in the foreground? None have yet ven-

tured to reply in the affirmative. Hence it is evident that the right of property to which they appeal, as one based on justice, is an erroneous theory.

Justice is of all times; and if the right of property in ideas would have been, in times gone by, a principle destructive of society, and therefore incompatible with justice—which scarcely admits of dispute—it is equally so in our day. For it will not be asserted, we imagine, that what emanates from the brains of men in our own age, is more worthy of respect or more ingenious than that which was produced before them. To think so would be a lamentable error or a foolish boast. Thus the only difference which there is in a comparison of epochs is, that in carrying back thought to the commencement of society, we perceive the impracticability and the absurdity of the doctrine of proprietor-thinkers in its naked form and in its full force; and that in analyzing this doctrine when applied solely to our century, we perplex and darken our vision, because we see society already constituted, and we lose sight of the view that civilisation may be retarded and may perish.

If the inventor of the alphabet and the formation of words by the aid of signs had had the property of his invention, and had bequeathed it to his descendants, what would have become of the art of writing? If the first poet who entertained the idea of putting together rhythmical phrases, mingled with those consonances which are called rhymes, had enjoyed, he and his heirs, the exclusive privilege of manipulating this form of speech, where would poetry have been? If the discoveries of all those who have occupied themselves with mathematics, physics, chemistry, botany, geology, medicine, surgery, etc., etc., had not been made available to others, where would be the sciences? If the public had not been allowed to profit by all the progressive advances made in the production, the transformation, and the transport of useful commodities, where would be the arts of agriculture, of industry, and of commerce? Evidently, they would all have remained in a rudimentary condition; and for every kind of labour, for every trade, for every profession, we would be living under a system of castes and of corporate privileges a thousand times more injurious and more retrograde than any system which has been known to exist.

We understand the partisans of property in ideas to reply to us, that society, on the ground of public utility, is entitled to expropriate this or that idea which it may deem useful to introduce into the

public domain ; and that by this expedient, progress would no longer be shackled. Let us reply to this objection.

If we must have a law of property in ideas, it is right that it should bear the impress of perfect equality for all thinkers ; and since every one has ideas within his sphere of action, however narrow they may be, it follows that the law, if it is not to be unjust as well as retrograde, must apply to all human labour : to the labour of the artisan as well as to that of the literateur : to the labour of the cultivator of the soil as well as to the higher combinations of science. A law, framed solely in the interest of this or that class of labourers, would be a law of exceptions incompatible with the democratic tendencies of our age.

Legislation upon the property of ideas ought then to govern all the applications of each individual intelligence. What an overwhelming task ! And is it desired that a government, supported by a legion of functionaries, should set itself to hunt out all that is done in the most remote corners, to forestall useful ideas, and to present them as an offering to social progress ?

The idea is a mockery. Liberty alone is the mother of progress ; not government. With the right to imitate, to counterfeit, to reproduce, and to perfect, all intelligences are maintained in activity. Take away this liberty, and it is not a government that can replace the action of myriads of populations originating under movements the most complex and the most varied.

It is then certain that, in interdicting the multitude from acting upon ideas which do not emanate from the brain of the person who seeks to make them operate upon matter, we put a stop to progress.

But admitting that the property of ideas may be recognised with the palliative of legal expropriation, how shall we be enabled to distinguish a proprietary idea from one which is not property ? In the category of subjects which are tangible and limited, everything which has a value is property. *There* there is no room for misconception ; but in the category of ideas which elude the sight and the touch, how can the distinction be made between ideas under the public dominion and those of private property ? Must we make for every aggregation of citizens a mortgage registry, in which all proprietary ideas shall be inscribed ; and must we oblige all, ignorant as well as lettered, to learn this register by heart ? And if we have to make international treaties not only with the European continent, but with America, Bolivia, Morocco, and China, will the territory

of one country suffice to find room for all the waste paper heaps of this world of ideas?

The partisans of idea-property, in order to distinguish it from ideas common to all, have invented and put in practice certain distinguishing signs. It is thus that ideas embodied in a book, which the author wishes to appropriate, bear the inscription: *Property of the author*. We can understand that the reader who holds in his hands such a work may seize the meaning of the words, but can he determine their extent? If he is a writer himself, may he or may he not cite such and such an opinion in support of such and such a doctrine? May he or may he not comment upon or criticise this or that passage while reproducing the text? May he or may he not seize upon this or that fundamental idea of the book in order to invest it with a new form, or to give it a new development? These are matters impossible to determine in any law. Then, again, are all the ideas of literary property ideas of invention? Are there not a crowd of them perhaps gleaned from traditionary lore, or culled from old parchments, or even from the literature of the day? How are we to discover what is comprised in that vague indication, *Property of the author*?

But we will go further. It is possible to be initiated in the proprietary ideas of a book in another way than by reading it, and consequently without being cognizant of the stamp of legal property which belongs to it. A professor may reproduce them in his prelections, an orator in his speech, a conversationalist in his talk, a singer in his song. How, then, shall the auditory distinguish in this case the character of property attached to this or the other idea?

To distinguish patented ideas applied to the construction of machines, or to the fabrication of certain products or other industrial designs, the word Patent is inscribed upon those machines and upon those products. Unfortunately this word is found every day upon things which nobody would dream of patenting; and supposing this abuse had not existed, are we to compel all the merchants, wholesale and retail, all the consumers, and all the second-hand dealers, to preserve upon merchandises the stamp of exclusive privilege?

Once more, to escape from the labyrinth into which we wander in wishing to arrest free thought, is utterly impossible, and by consequence the property of ideas is not merely absurd,—it is impracticable.

The principle of complete and absolute liberty in the domain of in-

telligence, which we profess, leads us, by the rigour of its logic, not only to the rejection of a perpetual and hereditary property in ideas, but also to the reversal and entire abolition of all the existing laws relating to what has been called literary, artistic, and industrial property, from the instant that those laws guarantee to any citizen the exclusive property of an idea as a right; and if we admit temporarily a certain protection of individual labour under certain restrictions, it is only because theories the most just, applied absolutely and inflexibly to a society governed by systems the most contradictory, give too violent a shock to received ideas and established usages to admit of being carried into action in their rigour.

We do not propose, therefore, the application of the ideal standard of the doctrine which we profess,—that is to say, the absolute and immediate liberation of labour; but in an age when we are advancing towards the system of a free exchange of the products of intelligence, we protest with the utmost energy against the new fetters with which it is sought to surround their creation; and we demand that the existing rights of authors and inventors shall be gradually abolished, as we would proceed to the gradual abolition of customs duties. Can there be, in fact, two principles more contradictory than that of general liberty by the side of personal privilege? Can there be a greater anachronism than to say to the public, You are free to transport the products of your labour; but these products you are not at liberty to produce? It is as if one should say to an individual, I give you the liberty of travelling round the world, but you must walk with irons at your feet. Yes, we do not hesitate to say, that free trade without free labour is but a shallow pretence.

We are aware that the laws which protect individual labour have been dictated by generous sentiments. The object desired was to offer a prize to the author, to encourage the artist, to indemnify the inventor; but were not these the self-same sentiments which inspired the laws for the protection of national labour? Where is the argument which has done duty in support of the protection of communities, and which has not been at the same time employed to support the protection of individuals? And, again, can any arguments be adduced in favour of free exchange, and which do not speak as clearly in favour of the freedom of labour?

Free exchange, it has been said, is the ruin of industry. The right of imitation will be the ruin of the manufacturers.

Without the protection of natural labour there will be no stimulus

and no progress; without intellectual property there will be no manufacturers of thought, no writers, no artists, no inventors.

Custom-houses, it has been said, on the other hand, are barriers isolating the nations; copyrights and patents, we may say, are barriers isolating the individuals whom they concern.

A petty nation, it has been urged, could not keep pace with the more powerful upon a free market; but it was sufficient to name Switzerland, and by this single illustration the argument was destroyed.

We shall cite here the same country in support of our main proposition. To those who tell us, Without patents for inventions there will be no industrial progress, we shall reply: Go to Switzerland, and you will see industrial talent under all its applications, although Switzerland has never been harnessed in the yoke of the Patent Laws. To those who tell us, Without protection for ornamental designs and trade-marks there will be no designers, we reply: Go to Switzerland, and you will see there, in all the centres of manufacturing industry, abundance of skilled designers, and with all that, no property in designs. To those who say, Without copyright there will be no writers, we would make the same reply, if the past history of the entire world were not there to reply for us.

THE MONTH.

Improvement of Professional Organization.—Most of our readers must by this time be aware of the movement which is in progress for obtaining the sanction of the Legislature to a scheme for improving the organization of those bodies constituting the legal profession throughout Scotland. We understand that at least two Bills have been prepared in connection with this subject; and that steps have been taken by their promoters, with a view to united action on the subject, and for obtaining the co-operation of the various local bodies who are interested. The proceedings, in the meantime, have not been communicated to the public; and as the matter is one of considerable difficulty, and some time must necessarily elapse before the heads of a measure can be adjusted, it would be premature to offer any observations on proposals which are merely tentative, and which, in all probability, may yet undergo considerable modification.

We may, however, take this opportunity of offering a suggestion upon what we think ought to form one of the features of a measure such as we understand to be in contemplation.

In England, the profession of a solicitor gives not merely a local but a national status. A solicitor, when admitted to practise as such by the court, acquires a position which entitles him to practise in any part of the kingdom. So much is this the case, that even as regards the practice of the superior courts of law and equity, a country solicitor is exactly in the same position as a London solicitor. He is entitled, if he pleases, to come up to London and conduct his clients' cases in person, without the intervention of a London solicitor; and it is merely from a consideration of the inconvenience of having to do so, that the practice has become general, if not universal, of employing a London solicitor. The London solicitor, when so employed, is held to be the agent of the country solicitor, and the latter is entitled to a commission on his agent's bill of costs. Again, a solicitor practising out of London may, if he finds it for his interest to do so, transfer his place of business to London, or to any other town; and having done so, he is entitled to all the privileges enjoyed by any practising solicitor in the locality.

In Scotland, a solicitor is, as regards one branch of his practice,—that, namely, connected with judicial proceedings,—confined to one locality. If he is induced, by the offer of a partnership, for example, to remove to a different county, he may continue to practise as a notary, and as a conveyancer and general agent; but he cannot practise before the courts without becoming a member of the society of procurators for the district. We do not say that there is anything unreasonable in this requirement. It is necessary that there should be such societies, and that certain restrictions should be placed upon the power of admission, to prevent these bodies from being overrun by unqualified persons. The payment of fees must, of course, form a condition of joining such a body, and of obtaining the benefit of the library and other objects to which the funds of the society are applied. But there are conditions which cannot always be fulfilled by a member of one legal corporation who may be under the necessity of seeking admission to another. Such are the conditions of apprenticeships and entrance examinations.

It is, of course, to be expected that the period of probation, and the standard of attainments required of entrants, should vary in

different parts of the country. It is not desirable that applicants for admission to practise in the smaller county towns should be required to pass the same examination as an entrant of the metropolitan societies, or of the Faculty of Procurators in Glasgow. A difficulty thus arises as to the admission into societies preferring a higher standard of attainment, of members of other societies where the qualification is lower. To concede an absolute right of admission to members of other societies on the sole condition of payment of fees, would be inexpedient; because young men, unable to pass in their own county, might be tempted to go up for examination in a county where the qualification was lower, with the view of afterwards coming in, upon payment of fees, as a procurator in their county. We think, therefore, that a residential test ought to be adopted. The first object of any comprehensive measure, should be to establish a minimum educational test for the whole of Scotland. Let that test be such as to ensure that every solicitor has the ordinary education and attainments of a gentleman; and let each society, if necessary, add special educational qualifications of their own, to be applied to all candidates for admission to their own body, who are not already in the possession of a professional status. But with regard to applicants coming from a different county, and who have already passed the minimum educational test, we would propose that such persons, if they have resided and *bona fide* carried on business in their own counties for a certain number of years, should be admitted into the societies of any other county, and also into the metropolitan societies, upon payment of the ordinary fees, without undergoing an examination, and that in their case also the apprenticeship qualification should be dispensed with. If any further restriction is requisite, it might be found in the test of the ballot.

We are aware that these views will in many quarters incur the suspicion which, in so conservative a profession as the law, attaches to all novelties; but some relaxation of the existing system is urgently called for. That system does not really secure a monopoly of business to members of the practising societies; it merely subjects individuals who are not members to a certain amount of personal inconvenience. A member of the Glasgow Faculty of Procurators, for example, may enter into partnership with an Edinburgh agent. Practically the new partner assists in carrying on business before the Court of Session. He cannot sign Signet letters, because he is not a member of the Society, and thus he is put to the inconvenience

of getting somebody to sign them for him ; but the members of the Writers' Society are exposed to the same competition as if he had the privilege of signing. Would it not be better for all parties in such a case, that the new-comer should be admitted a member of the Society upon payment of the usual fees, if the Society were satisfied that, before being admitted into the Glasgow Faculty, he had served an apprenticeship, and passed an examination equivalent to that which they require from their own members, and that no objection existed to his admission ? We think the affirmative of our question might be safely maintained, and that the professional bodies (of whom we have cited the first in standing merely to test the argument) would be materially benefited by an interchange of professional relations, under such an equitable arrangement as we have suggested.

Retirement of Lord Mackenzie.—The retirement, on account of ill health, of a Judge in the Court of Session, while still in the vigorous period of life, is a deplorable misfortune. In the case of Lord Mackenzie, this disaster has fallen on one whose great qualities as a lawyer had won the fullest professional confidence. For more than a year past, Lord Mackenzie was manifestly labouring under illness of some kind. He found himself inadequate to prolonged sittings on the Bench, and his great quickness of apprehension and tenacity of recollection seemed to have become diminished ; yet his judgments, although arrived at with much more labour, retained to the last that accuracy and logical clearness which made them pre-eminently stand the test of appeal to the Inner House. Early in last summer session he yielded to the representations of anxious friends, so far as to procure leave of absence from those duties which had been the happiness of his life, and to refrain from those kindred studies which he had pursued with only a too great devotion. But the allotted period of leisure, although marked by occasional hopeful rallies, closed without amendment ; his Lordship's resignation was sent in ; and we deeply regret to learn that his strength is so reduced as to cause serious apprehensions for the result.

He was admitted a member of the Bar in 1832 ; and, after a brief tenure of the office of Solicitor-General, became a Judge in January 1855. As an advocate, his abilities were such as to secure immediate confidence,—clear, accurate, industrious, and ready. He was not less at home in a feudal question than in commercial litiga-

tion. He thoroughly understood all the intricacies of the forms of process. He could equally well address a jury or a judge. As a speaker he was clear, precise, and fluent ; with occasionally a fire and impetuosity that seemed to dilate his small and slender frame. These qualities, coupled with untiring industry, made him a most valuable counsel ; and he was for years the favourite junior of Lord Advocate Rutherford, both in pleading and in consultation.

That which will longest preserve the name of Lord Mackenzie is his admirable book, the *Studies in Roman Law*, with comparative views of the laws of France, England, and Scotland ; a work now adopted as a university text-book both in England and Scotland. Unlike most epitomes, usually the hasty abstracts of one or two larger works, Lord Mackenzie's book is the carefully distilled product of immense labour and erudition ; the simplicity of its language is the reflection of his own clear apprehension ; and joined with these qualities, its systematic completeness, somewhat disguised under a too modest title, renders it the best introduction to general jurisprudence, and has induced many who never before ventured on a law-book, to peruse it from end to end with profit and unexpected pleasure.

Sensible of the loss sustained by the Court from the illness and retirement of Lord Mackenzie, we shall feel consoled, in common with his Lordship's many attached friends, if the leisure now obtained bring with it an improvement in his health and a prolongation of his life. The profession loses an accurate, painstaking, and learned Judge, who had that independence of mind that would have made him an acquisition in the Inner House. His friends lament the loss of one who had many kindly and endearing qualities, and of whom all are proud, as an example of what may be achieved by industry, honourable conduct, and talent, unaided by family or political influence.

The profession are naturally anxious to learn who is to be appointed to fill the seat vacated by Lord Mackenzie, but as yet nothing authentic has transpired ; and we presume that, until Her Majesty's consent is obtained to any arrangement that may be in contemplation, the matter will be kept secret.

New Books.

A Treatise on the Parochial Ecclesiastical Law of Scotland. By JOHN M. DUNCAN, Advocate. Edinburgh: Bell and Bradfute.

MR DUNCAN is already favourably known as a contributor to professional literature, through his 'Digest' and 'Manual' of Entail Law, —works which, although professedly mere compilations, and therefore not aiming at a high standard of literary or legal excellence, are distinguished by great accuracy and careful arrangement of matter. The present Treatise is a work of a more important character, and we may be permitted to congratulate the author on the advance which he has made from the useful but mechanical rôle of the digest-writer to the higher walk of the text-writer, for which the present volume proves him to be very well qualified.

It is scarcely possible to repress a feeling of vexation at finding that so much solid, substantial work,—so much judgment in the arrangement of materials, and skill in their exposition,—should have been thrown away on anything so unattractive as the law of parishes, a subject which ought to be abandoned to writers whose chief or only qualification is industry. Doubtless it is an advantage, if you are in quest of authorities on a topic connected with parochial law, to be able to refer to works like that of Mr Dunlop or the present Treatise; yet we cannot help wishing, that the same labour and application had been bestowed upon some topic of more general utility. If, for example, Mr Duncan had brought down any one of the subjects which, under the general name of mercantile law, have slept undisturbed in Bell's Commentaries since 1826, we would cheerfully have submitted to the necessity of reading Connell on Parishes from beginning to end on every occasion that we required to consult that most erudite but inconsequential author.

Our business, however, is not to find fault with Mr Duncan's choice of a subject, but to estimate his treatment of the subject he has chosen. To review a purely legal treatise in the ordinary way is simply impracticable, and we believe we shall best accomplish our object of recommending what we believe to be a useful and valuable work, by putting the reader in possession of an outline of the subjects which the author has undertaken to illustrate. As a matter of

course, he begins with a history of the Origin of Parishes. Upon this subject all we shall say is, that highly as we esteem the author's qualifications as a lawyer, we are not prepared implicitly to accept his teaching as a historian. Strict criticism upon this subject would be unfair, as the author has simply adopted the usual conventional treatment of the subject introduced by previous authors, and which has probably been handed down from the monkish writers of the middle ages. It may have been pardonable in Lord Stair to trace the division of the Christian world into parishes to a 'Pope Euaristus,' who is supposed to have flourished A.D. 100, but the quaint anachronism will scarcely bear repetition a century after the age of Gibbon; and we cannot too strongly recommend to modern writers on ecclesiastical law to purge their works from the cant of the monasticism, and to bring their historical statements, as far as possible, into harmony with the conclusions of criticism.

Mr Duncan's second chapter treats of Patronage and the Settlement of Ministers. The law on this subject is clearly and accurately stated. We desiderate, however, a brief statement of the constitution of the ecclesiastical institutions of Scotland, as they existed prior to the Reformation,—a subject upon which none of our text-writers give any intelligible information, and which, however, must be understood by every lawyer who has anything to do with the practice of the Teind Court. Mr Duncan's notions upon this subject appear to be in some respects erroneous, or at least obscure. We should infer from his observations at p. 7, that there was no such thing known in our ancient ecclesiastical establishments as an *ex officio* connection between certain parochial benefices and certain offices in the cathedral of the diocese, whereas it is a fact, which any one may verify by consulting the printed cartularies of the different cathedral churches, that the canonries and other capitular offices were almost invariably attached to parochial benefices,—the parish priest of certain churches being *ex officio* dean, sub-dean, chancellor, precentor, or prebendary, in right of his benefice.

The next six or seven chapters are occupied with a discussion of the Civil Rights of the Church to its Property, the subjects treated being respectively entitled 'Churches,' 'Minister's Stipend,' 'Temporality of Benefices,' 'Manse,' 'Glebes,' 'Ministers' Grass,' and 'Church Lands.' Here we are happy to be able to award unqualified praise to his treatment of this department of ecclesiastical law. Mr Duncan's exposition of his subject is most perspicuous. The

bearing of the decisions, ancient and modern, is clearly explained, while the author takes care to curb that tendency to digression and prolixity to which other writers on this class of subjects have given the rein. The law on this subject is to a considerable extent consuetudinary, and the author has been careful to bring together all the information upon it that could be gleaned from official and quasi-historical sources.

The author in the concluding part of his work devotes a few chapters to some miscellaneous topics connected with parochial law, such as the Constitution of Church Courts, the Duties of Ministers and Elders in relation to the Poor's Roll, Schools and Schoolmasters. Under the last-mentioned head will be found an excellent summary of the statutory and consuetudinary law in relation to Education, including the provisions of the recent Statute. We trust that, by the time a second edition is ready for publication, the author may be able to add another Statute to his text, and that it may be one which will constitute an improvement in the existing educational system, commensurate with that effected by the old Scottish Statute to which we trace the foundation of our parish schools.

Mr Duncan's Treatise is carefully indexed. But excepting the index, there is no means of tracing the contents of the work. The table of contents contains merely the titles to the chapters. There is no analysis of their contents, and no rubric. What malignant sprite, may we ask, has whispered to Mr Duncan to omit the usual reference to the pages of the Treatise from his table of cases? To a lawyer acquainted with leading cases, the table of cases furnishes a ready mode of reference to the text of almost any legal treatise. Mr Duncan has omitted the customary reference, thereby rendering his table of cases mere useless lumber. Instead of that he has given a reference to the page of the Reports where the cases are to be found,—a freak which must have cost some trouble, but which is of no earthly use, because Tait's Index and the Index to the Digest give the necessary information.

The writer of these pages, during the five years in which he has discharged the duties of editor of the *Journal of Jurisprudence*, has spent a considerable portion of his time in the compiling, and also in the reviewing of law-books. His experience in the former capacity has taught him to be indulgent in the latter. Those only who have undertaken the heart-breaking labour of reading many thousand cases,—of summarizing, collating, reconciling, and digesting them,—

can fairly estimate the labour and the fatigue involved in such an undertaking. And now, on the eve of resigning the office of editor of this periodical, he wishes to offer a word of sincere advice to those members of his profession who may be desirous of engaging in the pursuit of professional authorship. The advice is very simple. It is precisely the same as *Punch's* advice to persons about to marry: DON'T. If you wish to write for fame, contribute to literary magazines, or to the scientific publications of your native town or district. If for money, accept any kind of literary hack-work rather than that of writing law-books, which is the least remunerating both to publishers and authors, in consequence of the very limited sale which such works can command. If your practice is unfortunately small, the authorship of professional works will do nothing to increase it; if it is larger, the time spent upon them is just so much time subtracted from what might be more profitably expended on preparing for the business of the day; while the ever-recurring necessity of devoting so many hours a day to what is felt, long before the work is completed, to be a sickening drudgery, tends only to inspire a disgust for a study which, when pursued under the stimulus of active professional employment, is neither a tedious nor an unprofitable intellectual exercise. A lawyer's hours of relaxation ought not to be given to the study of law, but to subjects unconnected with his profession. No mind, however well balanced, can escape the deteriorating influence of exclusive addiction to professional pursuits; and that influence is assuredly most strongly felt when the studies of the jurist are pursued, not under the changeful and picturesque aspects presented by the actual business of mankind, but in the arid and lifeless forms under which they are embalmed in the Statutes and Reports.

Analysis of Recent Cases, exemplifying the Difference between an Ordinary and an Indisputable Life Assurance. By ALEXANDER ROBERTSON, W.S. Edinburgh: T. and T. Clark.

MR ROBERTSON'S object is, of course, to show the advantages of an indisputable over an ordinary life policy. The subject is an interesting one; but the space at our disposal is too limited to admit of our discussing it as fully as its importance would merit. The essential feature of an indisputable policy, as Mr Robertson ex-

plains, is, that it is granted on one condition, namely, that the person assured 'is now living.' Such is the form of expression devised by that astutest of lawyers, the present Lord Chancellor, to exclude all questions of fraud or misrepresentation; and, all cavilling apart as to 'absolute' indisputability, we believe that the form in question will exclude ninety-nine out of every hundred questions that may be raised upon an ordinary policy. Litigation upon policies of assurance cannot be altogether prevented. There may be the question, Who was the party assured? and there is always the question, Whether that party is dead at the time when the sum assured is demanded? But we venture to think that it is just as legal and as rational for a company to insure a life without warranty, as it is for an individual to buy a horse on the same condition. In the one case, the purchaser must satisfy himself as to the soundness of the animal; and if he is 'taken in,' he has no recourse. In the other case, the insurance offices satisfy themselves as to the soundness of the human animal, upon whose longevity they propose to speculate. Nor do we believe that an insurance business conducted on this principle is necessarily or probably less safe than one under which much reliance is placed on the statements of the party making the proposal. We believe it is quite practicable to judge correctly of health and expectation of life, in the average of cases, by medical inspection alone; and although the medical officer's opinion may occasionally be contradicted by experience, that is just one of the risks which the company undertakes; for we are not aware that any company has undertaken to guarantee life in any other sense than that of paying the policy when the holder dies. The right kind of assurance is that under which a member of the public presents himself to the company, saying in effect: Here am I, a human being; examine me as you would examine an animal for sale in the market; form your own opinion of my age, health, and habits, and let me know the premium you require in consideration of a sum of money to be paid to my executors, in the event of my death before this day next year.

The society with which Mr Robertson is connected appears to act on this principle; and we are glad to learn, from his pamphlet, that their financial position is such as we should have anticipated from the carrying on of their business on what are obviously sound as well as equitable principles.

Digest of Decisions.

COURT OF SESSION.

FIRST DIVISION.

HOULSTON v. WESTERN BANK OF SCOTLAND.—Nov. 2.

Shares—Reduction of Transfer.

The pursuer stood on the list of shareholders of the Western Bank when it stopped payment. He was placed on the list of contributors, and paid the full amount of the first call, and a sum to account of the second call, made upon him by the liquidators. He now seeks, in this action against the bank, and Mr Lumsden as liquidator, to reduce the transfers to him of the shares which he held, or was supposed to hold, and the entries of these transfers in the register, with the certificates of such entries. He also seeks to recover payment of the price paid by him for the shares, and of the sums which he has paid on account of calls.

The pursuer stated that in 1852, through Mr Reid, the agent of the Western Bank in the Calton District of Glasgow, he authorized the bank to purchase for him twelve shares at L.71 per share, with the stipulation that the bank should charge no commission. Thereafter Mr Reid, on behalf of the bank, presented to him for signature two transfers—the one by Mr Gillies of ten shares, the other by Miss Govan of two shares. The pursuer signed these transfers, and paid the price of L.71 per share, at which he had agreed to purchase the shares, along with the expense of stamps and recording. He received the transfers, and retained them in his custody, and drew the dividends on the shares until the bank suspended payment.

The pursuer states that, in 1861, having heard that his name appeared in a list of parties who had purchased shares from the bank, he was led for the first time to look into the transfers, and that in consequence of so doing, and of further inquiries, he then learned that the shares in question had been purchased from Mr Gillies and Miss Govan by the bank some time before the transaction with the pursuer, and at prices rather lower than that at which he purchased. The transfers had been signed by Mr Gillies and Miss Govan blank in the name of the purchaser, but bearing, as the consideration, the prices received by them from the bank. In this state the transfers had been retained by the bank until they sold the shares to the pursuer, when his name was inserted as purchaser, and they were presented to him for signature, without any statement of these facts. In this state of the facts, the pursuer contended that he was entitled to have the transfers reduced, and to recover from the liquidator of the bank the price paid by him for the shares, as well as the sums paid on account of calls, in respect the transfers were null, (1) under the Act 1696, c. 25, which declares deeds blank in the name of the grantee when signed to be null and void; and (2) under the stamp laws, there being but one stamp

on each transfer, while there were two transactions of sale of the shares contained in them.

The Lord Ordinary (Barcaple) held that if the case had depended on the legal validity of the deed of transfer, it would have been very questionable whether they could have been sustained as valid and effectual by a court of law; but he did not think that the alleged invalidity of them would entitle the pursuer to prevail in the conclusions of the action. The pursuer's complaint was not that the shares were worthless, but that his title to them was liable to challenge. It seemed to be a sufficient answer that the bank could only be liable upon eviction, and could not be called upon in respect of a defect in the title to indemnify the purchaser for loss sustained, not from that defect, but from the unchallenged possession of the shares. If any question had been raised as to the validity of the transfers, he could not have refused to allow the bank to take such steps as might be necessary to cure the alleged defect. In existing circumstances the purchaser had no interest to have it cured. But it did not appear to the Lord Ordinary that he could upon that account get free from the obligations and consequences of his contract, the loss arising from which had not been in any degree owing to the defect in the transfers of which he complained.

To-day the Court adhered to the Lord Ordinary's judgment, on the grounds stated by his Lordship.

M.P., YOUNG'S TRUSTEES v. YOUNG.—Nov. 4.

Trust—Validity of Holograph Codicil.

The late Miss Mary Young, of 34 Bon-Accord Terrace, Aberdeen, by her principal trust-disposition and settlement, in regard to the validity of which there is no dispute, appointed payment to be made 'of the several legacies or bequests which by any writing or writings under my hand hereunto annexed, or on paper or papers apart, I shall make or settle.' At Miss Young's death there was found in her repositories, put up along with her trust-disposition, a document beginning as follows:—'*Codicil to my will. August 1860.—I wish to bequeath the following legacies.*' Then follow a number of legacies, and the document concludes thus:—'*This is written at my dictation. (Signed) Mary Young. Banchory, Aug. 20, 1860.*' The only part of the writing which is holograph of Miss Young is the part last above quoted, but there are several interlineations and corrections through it in her own handwriting. The question now raised is whether this paper or writing is valid and effectual as a codicil to Miss Young's trust-disposition and settlement.

The Lord Ordinary (Ormidale) held that the document was invalid.

To-day the Court recalled the Lord Ordinary's interlocutor, and held that the document was entitled to receive effect as a part of Miss Young's settlements. In support of the validity of the document it was contended, (1) that it was entitled to the privileges of a holograph writing in respect of the interlineations, corrections, and addition, made in Miss Young's own handwriting; and (2) that, as it was admittedly signed by Miss Young, it was a *writing under her hand*, and therefore fell within the description of writings which, by her trust-deed, she appointed her trustees to give effect to. The Court, in giving judgment, proceeded on the latter ground, thinking it unnecessary to decide whether, if the

document had stood alone, without any reference to it in a previous formal trust-deed, it would have been entitled to effect as a holograph will.

EARL OF MORAY v. REV. DAVID NICOL.—*Nov. 9.*

Church—Designation of Grass Glebe.

These cases, the one a suspension and the other a reduction, which were conjoined during the discussion, came to be advised to-day.

The facts out of which the cases arose are as follows:—The minister of Dalgety, in 1862, presented an application to the Presbytery of Dunfermline, stating that there were in his parish church lands, being grass lands; that in terms of the Act 1663, c. 21, he was entitled to have grass designed to him for the support of a horse and two cows, and praying the Presbytery to make the necessary designation accordingly. After the usual intimations from the pulpit and by circular to the heritors of the day fixed for meeting at Dalgety, the Presbytery met, and, with the assistance of men of skill, designed a grass glebe for the minister out of lands belonging to the Earl of Moray. There was no appearance for the Earl of Moray to oppose this designation, but a suspension was brought by his Lordship of the sentence of the Presbytery, in which he maintained that the lands designed were not church lands, and not grass lands; secondly, that the minister had already designed to him a grass glebe in the year 1770, and he produced an extract from the Presbytery's records in support of that averment. He further pleaded that this alleged extract had not been reduced, and must remain in force till reduced. A record was made up in this suspension, from which it appeared that the church, manse, and glebe of Dalgety were formerly within the policies of the Earl of Moray, and close to the sea-shore; that, having acquired part of the lands of Fordel, he was desirous of including the old glebe and stance of manse, garden, and offices into his policy; and that, after obtaining the consent of the then incumbent to an excambion of the old glebe for land farther from the shore, and without his policy, he applied to the Presbytery, stating his desire, offering to transport, at his own expense, the manse to the new ground proposed by him to be given in excambion, and he prayed the Presbytery to give their sanction to such excambion. Various procedure was had upon this application, which resulted in the execution of a deed of excambion between the Earl of Moray and the incumbent. The deed was simply a deed of excambion of the old glebe for the new, and had no reference whatever to grass for a horse and two cows; but in closing his minute the Presbytery clerk proceeds thus:—‘Then the Presbytery did, and hereby do, design and set apart the aforesaid park or enclosure, as bounded and described in former minutes, and the said contract of excambion, to be the legal glebe to serve for grass to a horse and two cows, and as the half acre customary for manse, offices, closs, and garden for the minister serving the cure at the church of Dalgety in all time to come, with freedom of foggage, fewel, feal, divot, loaning, free issue and entry, and all other privileges, according to use and wont.’—James VI., par. 13, c. 161. The argument for the minister was, that no designation of grass for a horse and two cows was contemplated in the transaction between his predecessor and the Earl of Moray; that no application had been made to the Presbytery for a

designation of grass, and no intimations to the heritors of such a designation; that the words of designation did not import a designation of a grass glebe, and had reference not to the Act 1663, but to the Act 1598; and in order to support his argument he brought a reduction of the Presbytery's minute in so far as it purported to be a designation of grass for a horse and two cows, which, as above stated, was conjoined with the action of suspension. The Court to-day unanimously found that the Earl of Moray had failed to make out a designation of grass in 1770, that the transaction was simply an excambion of the old for the new glebe; they therefore recalled the Lord Ordinary's interlocutor, which found that grass had been designed, found Mr Nicol entitled to his expenses, and remitted to the Lord Ordinary to proceed with the further points in the cause.

CRAWFORD v. CRAWFORD'S TRUSTEES.—Nov. 12.

Trust—Deathbed—Homologation.

The late James Crawford, jun., W.S., on 7th November 1863, ten days before his death, executed a trust-disposition and settlement whereby he disposed to Adam Howden Crawford, Edinburgh, and others, as his trustees, his whole estate, heritable and moveable. The uses and purposes for which the said trust-disposition and settlement bears to be granted are (after payment of the truster's debts and funeral expenses, implementing the obligations undertaken by the truster in his contract of marriage, and paying an additional sum to his widow, and certain small legacies contained in the trust-deed and relative memorandum) for payment of the residue of his estate, heritable and moveable, thereby conveyed as follows, viz.:—First, 'Four-fifths thereof to John Macdonald, general treasurer of the Free Church of Scotland, or to the general treasurer for the time being of the said Free Church, for behoof of the Sustentation Fund Committee of the General Assembly of the said Church, to be disposed of as the said Sustentation Fund Committee may think fit; and second, the remaining one-fifth part thereof to the Religious Tract and Book Society of Scotland.' By the said trust-disposition and settlement the granter revoked all settlements previously executed by him, and granted power to his trustees to sell the estates, heritable and moveable, thereby conveyed. Mr Crawford died on 17th November 1863, and at the time of his death there belonged to him certain house property in Edinburgh. He left no issue, and his brother, Adam Howden Crawford, whom he named one of his trustees, was his nearest lawful heir. Mr Howden Crawford has now brought the present action against his late brother's trustees, to reduce the trust-deed, in so far as it conveys heritages, on the ground that it was executed on deathbed, a few days before the maker's death, and while he was labouring under the disease of which he died. The trustees who are defending the action admit that the deed was executed on deathbed, but plead that the pursuer is barred by homologation, and by his conduct and actings, from challenging the settlement.

The case having come before the Court to-day on the question whether the defenders had made a relevant statement entitling them to an issue of homologation, the Court thought it expedient that the facts of the case should be established before disposing of any of the questions of law, and as they thought the case better adapted for proof by commission than

jury trial, they allowed both parties a proof of their averments, before answer—that is, reserving all questions as to the relevancy of the averments.

BONNAR v. HIBBS.—Nov. 15.

Contract—Construction of Building Agreement.

Mr Bonnar contracted with the Rev. Mr Hibbs to build the English chapel in St Vincent Street for L.1370. This was an action for extras, of which only an item of L.141, 7s. 8d. was disputed. The first clause of the specifications was in the following terms:—‘The ground to be cleared and the trenches for the walls to be executed so deep as to obtain a safe and solid foundation, and all earth and surplus rubbish to be carted away to such place as the contractor may obtain permission to deposit it.’ And by the 112th clause, under the head of General Conditions, it was provided, that ‘no deviation will be permitted from the drawings, but any alterations that may be necessary, or that the committee and architects may deem beneficial during their progress, shall be made without vitiating or affecting the contract to be entered into, the cost of which shall be ascertained at the time, and an order given, signed by the architects, as on no account will any extra charges be allowed unless upon the written order of the architects.’

It appeared that Mr Hibbs had stipulated with the architects, Messrs Hay of Liverpool, that the entire cost of the building should not exceed L.2000; and Mr Hay, in going over the plans with Bonnar, had told him that no excavation was required, the ground being assumed to be ready for building. Instead of this, considerable excavation was found to be necessary for the basement floor; and, in building the foundations, a timber bond had to be introduced, and in various respects the plans were departed from. As Mr Hibbs has had to pay nearly L.2700 for the chapel, he objected to the builder’s charges for the above work, on the ground that he had been kept quite in the dark on the subject till the chapel was completed; that had he known he never would have sanctioned such an expenditure; that there was no written order by the architect; that neither he nor the committee were ever consulted; and that the price had not been ascertained in terms of the contract. It was also maintained that the timber bond, and the greater part of the work charged for, was not for the benefit of the building but of the builder, who otherwise would have been bound to go deeper down to obtain, as he undertook to do, a ‘safe and solid foundation.’

The pursuer, in answer, pointed to various passages in Mr John Hay’s letters to him as sufficient orders for the work sued for; and pleaded that, though the cost was not ascertained at the time, nor Hibbs himself consulted, he was bound by the proceedings of his architect, who was his agent between him and the builder.

The case having been remitted to Mr Rhind, he reported, after a great variety of procedure, in favour of the disputed items to a considerable extent. Thereafter Lord Barcaple decided in favour of the defender, holding, on a review of the correspondence, that any other result would make inoperative the 112th clause of the contract, which had obviously been introduced for the employer’s protection.

The pursuer (now Mrs Bonnar, widow) having reclaimed, the Court

to-day altered the Lord Ordinary's interlocutor, and decided that Mr Hay's letters were sufficient orders, that Mr Hibbs was now bound by them, that the provision of the contract had thus been practically complied with; and it being proved that the work was done, the pursuer was entitled to recover the amount claimed.

Appeal.—M'KAY v. SIMPSON.—Nov. 19.

Bankruptcy—Offer of Composition.

This was an appeal taken in the course of the sequestration of the appellant. At a meeting of his creditors held after his examination, the bankrupt offered a composition of sixpence per pound. There were five creditors present, of whom three voted in favour of entertaining the offer of composition, one voted against entertaining it, and one declined to vote. It was maintained for the appellant that the mere presence of the creditors who declined to vote was not to be taken into account in calculating the number of creditors present, or the amount of debt due to them; and that in the present case the affidavit of the creditor who declined to vote was invalid in respect he had used an arrestment, by which he acquired a security, and that he had not valued that security. The respondents maintained that the terms of the statute, which required four-fifths in value and a majority in number of the creditors 'present' at the meeting, had not been complied with. Four-fifths in value of the creditors present, voting or not, had not entertained the offer of composition, and the offer therefore fell. The arrestment was argued to be no arrestment, because used four or five days before sequestration was granted, and was therefore ineffectual.

The Court to-day, adhering to the Lord Ordinary's interlocutor, gave effect to the contention for the respondents, and dismissed the appeal with expenses.

SECOND DIVISION.

N. B. INSURANCE CO. v. TUNNOCK AND FRASER.—Nov. 2.

Insurance—Error in Policy.

The North British Insurance Company raised this action of multipounding to determine who had right to the sum of £400, contained in a policy of insurance effected in their office upon the joint lives of the late Mr Tunnock and his wife. By the terms of the policy the sum assured was to be paid to the executors, administrators, or assigns of the said assured, within three months after the death of either of the said assured. The claimants were the widow of Mr Tunnock and the trustees on Tunnock's sequestrated estate.

The Lord Ordinary found that, by the true intent and meaning of the deed, the sum insured was payable upon the death of either of the parties assured to the survivor, and accordingly preferred Mrs Tunnock in the fund *in medio*. His Lordship held that the terms of the policy being defective, it was impossible to put any intelligible meaning upon the clause of the policy without extraneous evidence. The effect of that evidence, his Lordship held, showed the true understanding of the parties, and gave ground for his judgment.

Tunnock's trustees reclaimed, but to-day the Court adhered, proceeding upon a different ground of judgment from that upon which the Lord Ordinary proceeded. They held that the cause of ambiguity was a clerical error or omission in the policy. The policy was in most parts a printed document, adapted for a single life, and had been in several places altered in writing to suit the double policy; it was a mere omission on the part of the company to make the proper alteration on the printed document, by stating that the sum assured was to be payable to the survivor of the spouses, and this omission could not prejudice the rights of Mrs Tunnock.

SHAW STEWART v. M'LAULAY.—Nov. 4.

Property—Feu Contract.

This was a question as to the northern boundary of a piece of ground in Greenock, feued by Mr Young, the defender's author, from the late Sir Michael Stewart, in 1826.

The Court recalled an interlocutor of the Lord Ordinary (Jerviswoode), and found that, by a sound construction of the feu contract, the north boundary of the feu was the Low Gourock Road, and that the piece of ground claimed by the pursuer was included in the feu contract, and formed part of the property of the defenders.

SAWERS v. SAWERS' TRUSTEES.—Nov. 9.

Trust—Fee and Liferent.

By *mortis causa* settlement the late Peter Sawers, after appointing certain legacies and annuities, directed *inter alia* as follows:—‘And in the last place, I direct and appoint my said trustees and executors, after paying or providing for the payment of the foregoing purposes of the trust, to pay and convey the residue and remainder of the said trust-estate to and in favour of the said Henry Sawers, in liferent, for his liferent use allenary, and to his male issue, if any, lawfully begotten, who shall be in life at the time of my death, in fee; whom failing, to the said Rev. Peter Sawers, in liferent, for his liferent use allenary, and to his male issue, if any, lawfully begotten, who shall be in life at the time of my death, in fee;’ whom failing, to certain other substitutes. Henry Sawers now brought this action against the trustees to have the residue and remainder of the trust-estate conveyed in his favour, in terms of the direction and appointment in the trust-deed, under burden of the annuities foresaid, so far as they still subsist. He pleaded that the prior purposes of the trust being implemented, or their execution being fully secured, the defenders were bound to convey to him the residue. The defenders pleaded that the purposes of the trust, which required to be satisfied before the defenders could pay or convey to the pursuer the residue of the trust-estate, not having been fulfilled, the defenders were not bound, *hoc statu*, to pay or convey as concluded for. The Lord Ordinary found that the pursuer was entitled to the liferent of his whole residue after satisfying or providing for the satisfaction of the primary purposes of the trust, and this from and after the date of the testator, during the whole life of the pursuer, and repelled the defences so far as inconsistent with the foregoing finding; and further appointed the cause to be enrolled,

in order to the determination of the best mode of carrying the said finding into effect. The trustees reclaimed, but to-day the Court adhered.

LAMBERT v. SMITH.—Nov. 11.

Lease—Warning.

Thomas Lambert, tenant of certain subjects in the stewartry of Kirkcudbright, presented this note of suspension against Janet Coltart Smith, principal lessee of the said subjects, setting forth that he was charged, or threatened to be charged, at the instance of the respondent, to remove from a cottage of which he had been tenant for five years. The cottage was let on a verbal lease, renewed from year to year. The question was, whether sufficient warning had been given to the sub-tenant that he must remove at the next term. The averment made by the respondent, the principal lessee, was, that on the 3d of April 1862 she went to the suspender's shop, 'and there, in the presence of James Crawford and Thomas Rae, both joiners at Milton aforesaid, who were specially called as witnesses, personally warned the suspender to remove from the premises at the following Whitsunday, by intimating to the suspender's wife—the suspender himself being from home at the time, and his wife being left by him as his representative in charge of the premises, and of the shop aforesaid—that they, the suspender and his wife and family, would have to fit and remove from the subjects in question at the following term of Whitsunday 1862.' It was admitted by the suspender, that on the 5th of April he was told by his wife that the respondent had called on her on the previous Thursday, and given her notice to quit at Whitsunday. The notice, if not given until the 5th of April, was insufficient to ground a removing; and the complainer pleaded that timeous warning of removal not having been given, the lease must be held as having been renewed by tacit relocation.

The Steward-substitute held that sufficient notice had not been given, and sustained the plea founded on tacit relocation. The Sheriff, on appeal, reversed the decision.

The Lord Ordinary (Lord Barcaple) affirmed the judgment of the Sheriff, being of opinion that the notice given on 3d April by the charger herself to the suspender's wife was sufficient to prevent tacit relocation. 'It was quite clear in its terms, and was deliberately given, as was shown by two witnesses being taken to the house. The only question is whether it can affect the suspender, seeing that it was given to his wife, and was not communicated to him by her until the 5th April, the 4th being the last day on which timely notice could be given. The Lord Ordinary thinks that distinct verbal notice given to the tenant's wife upon the premises, and because he is absent at the time, is sufficient at least to the extent of throwing upon him the burden of showing that it was not available to him. The suspender was at home on the morning of the 3d of April, and it is not said that he did not return to his house that day or on the 4th. There is no ground to presume that the wife had not ample opportunity during that time to communicate the notice to him, and the charger might fairly assume that she would do so without delay.' Lambert reclaimed. To-day the case was advised, and the Court, by a majority, reversed the decision of the Lord Ordinary.

BROWN v. SHAW.—Nov. 11.*Evidence—Poor Law.*

John Shaw, inspector of poor of the parish of Kilbarchan, brought an action in the Sheriff Court of Ayr against Matthew Brown, inspector of the poor of the parish of Galston, for repayment of L.18, 18s. 10d. of aliment advanced to Mary Thompson and her two children, then residing in Kilbarchan. The averment of the pursuer was to the effect that the late John Thompson, husband of Mary Thompson, residing latterly sometimes in Kilbarchan, sometimes in Paisley, died without acquiring any residential settlement there, and that the parish of Galston, as his birth-settlement, was liable for the aliment of his widow and children. The defence was a denial that Galston was the parish of Thompson's birth. The Sheriff-substitute, after a proof, found that the pursuer had failed to prove his averment, and assolizied the defender. The Sheriff, on appeal, reversed this decision. In the Inferior Court certain evidence was brought forward of what an aged witness, now deceased, had said on precognition by the pursuer's agent. A commission had been taken to examine this witness, but had not been executed.

The Court held that evidence on commission was inadmissible, and to-day returned to the judgment of the Sheriff-substitute.

LOCALITY OF CRAIL.—Nov. 16.*Teinds—Heritable Right.*

This was a question between Sir Thomas Erskine of Cambo and W. T. Monypenny, Esq. of Pitmilny, and the common agent in the locality of Crail, as to how far the objectors are barred from maintaining in the present process that the teinds of their lands have been valued, and that they hold heritable rights to their teinds. The valuation of the teinds of the whole parish of Crail was approved of by the High Commission in 1631. In 1797 an augmentation of L.360 Scots was awarded to the then stipend of ten chalders. The augmentation was apportioned according to the old locality, under which the stipend was payable proportionally by all the heritors. Sir W. Erskine and others objected to the proposed allocation, 'because, having a heritable right to the lands, it is not competent to burthen them with any part of the augmentation so long as there are other heritors in a less favourable situation.' These objections were afterwards departed from by the objectors, on the ground, as stated in the minute lodged by them, that insisting in them would involve parties in difficulties almost inextricable, and retard the cause. The locality was accordingly approved of. The common agent in the present locality now maintained, *inter alia*, that the present objectors were barred from founding on their decree of valuation, in respect of its having been waived in the former locality of 1797-8, and the final judgments in that locality having been pronounced on the footing of that valuation having been abandoned or set aside, as being incapable of regulating the rights of the parties, or now inapplicable to the existing circumstances of the parish.

The Lord Ordinary (Lord Ormidale) repelled the plea of the common agent, holding that it was competent in the present process to inquire whether the teinds of the objectors' lands had been valued, and whether

they held a heritable right to the same, and that the question was not *res judicata* by reason of the approval of the former locality.

The common agent reclaimed, but the Court adhered.

CRAMMOND v. LOWSON'S TRUSTEES.—Nov. 16.

Jurisdiction—Interdict.

This case originated in a petition presented in the Sheriff Court of Dundee, at the instance of the trustees of the deceased David Lowson, flaxdresser and manufacturer in Hillton of Dundee, against W. P. Crammond, flesher, Murraygate, Dundee. The petitioners are proprietors of the northmost of three roods of land in Hillton of Dundee; the southmost is the property of the respondent; the middle rood is the property of a third proprietor, not a party to the process. The pursuers claim a servitude *non edificandi* over the middle rood. They complained in their petition that the respondent had erected, or was in course of erecting, buildings upon the said southmost piece of land, which encroached upon the servitude tenement and the pursuers' right of servitude; and they prayed for interdict against the respondent erecting any buildings which might so encroach, and for removal of the buildings already erected. The defender pleaded, *inter alia*, (1) that the application was incompetent in the Sheriff Court, in so far as it craved decree to remove the buildings already erected; and also (2) in respect that it involved a question of heritable title. On the merits, he pleaded acquiescence on the part of the pursuers. The Sheriff-substitute repelled the second mentioned preliminary plea, on the ground that the petition was brought to vindicate an alleged servitude, a kind of right as to which jurisdiction was expressly conferred on the Sheriff Court by 1 & 2 Vict., c. 119. Then, after a remit to an architect, the Sheriff-substitute found that the defender had, in the course of erecting the buildings complained of, encroached on the pursuers' servitude *non edificandi*, that the encroachment was of recent date, and that the pursuers were not barred by acquiescence from challenging the same, and granted the prayer of the petition. The Sheriff, on appeal, adhered.

The defender advocated, and to-day the Court reversed the judgment of the Inferior Court, on the ground of want of jurisdiction.

Per Curiam: The allegation of the pursuers was, that the defender had built on ground not his property. The defender denied this, and alleged that the ground on which he had built was his own property, and that he had not committed any encroachment on the rights of the pursuer. Now, the Sheriff must here declare a right to property in some way, and this question does not arise incidentally. It is the whole substance of the case. The whole question to be determined is, whether a certain piece of ground is or is not the property of the defender. This is a question which the Sheriff is not competent to decide. A question of heritable right may under certain circumstances arise in a Sheriff Court, so as to make it difficult for the Sheriff to shut his eyes to the question to whom a property belongs. But if the question arises, Whose is that property? the Sheriff must sist the action before him until the right be cleared by declarator in this Court. Now, in this case, the question is not only to be determined to the effect of clearing a right of servitude, but also of fixing the limits of the defender's estate in all time coming. The Sheriff has no jurisdiction to entertain this question.

English Cases.

BILL OF EXCHANGE.—Defendant, intending to become surety to plaintiffs for A., put his name at the back of a blank bill stamp, on which A. wrote his name as acceptor, and plaintiffs then drew upon it a bill of exchange payable to their (drawers') order. It was held, defendant was liable to plaintiffs on this instrument as the drawer of a bill, payable either to bearer or to plaintiffs' order. Cockburn, C.J.: I think the defendant is liable on the principle of *Penny v. Innes* (1 Cr. M. & R. 439). In that case it is laid down as a general proposition, that every indorser may be taken as the drawer of a fresh bill, according to the tenor and effect of the bill on which he puts his indorsement. There a stranger, that is, a person no party to the bill, intervened and wrote his name on the back of the bill, and he was held liable as drawer; and the whole doctrine amounts to this, that a man who puts his name in this way as indorser, although not in legal acceptance an indorser, does what an indorser does; he guarantees the payment by the acceptor at maturity. In that sense he does what a drawer does, and so, although he cannot be an indorser, he may be treated as a drawer. —(*Matthews v. Bloysome*, 33 L. J., Q. B. 209.)

CARRIERS BY RAILWAY.—The 7th section of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), enables a railway company to make reasonable conditions with respect to receiving, forwarding, and delivering animals, etc., and provides that no greater damages shall be recovered from such company for the loss of or injury to a horse than L.50, unless the person sending or delivering the same shall, at the time of such delivery, have declared it to be of a higher value than as above mentioned, in which case it shall be lawful for the company to demand and receive reasonable percentage upon the excess of the value so declared, and which shall be paid in addition to the ordinary rate of charge, and such increased rate of charge shall be notified as prescribed in the 11 Geo. IV. & 1 Will. IV. c. 68. Plaintiff sent a horse of great value to the yard of defendants' railway station for the purpose of its being carried by their railway. By the direction of one of defendants' servants plaintiff's groom was leading the horse to the platform, when it was startled by another horse, and backed upon some sharp iron girders lying on the spot, receiving such an injury that it was necessary to kill it. No declaration of value had been made, nor had any ticket been taken or fare demanded; the usual practice at that station being to put the horse into the box, in which it was to be conveyed, in the first instance. Defendants were guilty of negligence in putting the girders in the place upon which they were lying. It was held, by Cockburn, C.J., that as the negligence complained of was not the negligence of defendants in their character of carriers, they were not entitled to the protection of the above section; and, secondly, that if they would have been otherwise entitled to the protection, there was no evidence of their having notified the increased rate of charge as required by the section; and that, therefore, on both grounds, the plaintiff was entitled to recover the full value of the horse. It was held, by Meller, J., that the provision in the section applied not only to the risks of carriage and conveyance, but also to those which attend the receiving and delivery; that the injury was done in receiving the horse; and therefore that, as there was no declaration of value, plaintiff could not recover more than the L.50. And it was held, by Blackburn, J., that the statute is not confined to neglects and defaults after the relation of carrier and customer has been completely established, and that the real value above L.50 cannot be recovered unless the declaration is made before the injury happens, though it happen before the receipt by the railway company be complete. —(*Hodgman v. The West Midland Rail. Co.*, 33 L. J., Q. B. 233.)

CARRIERS BY RAILWAY.—A railway company which carried on the business of common carriers and were empowered by their private act to charge 'for the carriage of small parcels,' that is to say, parcels not exceeding 500 lb. in weight each, 'any sum which they think fit,' charged a through-rate for the carriage of goods, which rate included their collection and delivery as well as conveyance on the line of railway, and was charged in all cases, whether the goods were collected and delivered by the company or not. The company formerly made a rebate of such rate for collection and delivery, if the same were done by the customer, but the company afterwards refused to make any rebate for this off the rate charged for the carriage of the goods under 500 lb. weight. Plaintiff, who was a carrier, delivered goods under 500 lb. weight at various stations of the company's railway for carriage on their railway, and was compelled by the company to pay the rate so charged for carriage without any rebate for collection and delivery, although such collection and delivery had been done by the plaintiff and not by the company. It was held in the Exchequer Chamber, affirming the judgment of the Court of Common Pleas, that the plaintiff was entitled to recover back from the company the amount of such rebate in an action for money had and received. —(*Baxendale v. The Great Western Rail. Co. (in error)*, 33 L. J., C. P. 197.)

CONTRACT.—A. contracted to supply B. 1000 tons of coals, delivered at Rangoon, at 45s. per ton, alongside craft, etc., as might be directed by B.; payment, one-half of invoice value by bill at three months, on handing bills of lading and policy of insurance to cover the amount, or in cash at L.5 per cent. discount, at A.'s option, and the balance in cash on right delivery at Rangoon. A. chartered a ship, and in pursuance of his contract shipped on board 1166 tons of coals, and delivered to B. the bill of lading, and a policy of insurance covering half the invoice price, and B. paid to A. half the invoice price. On the voyage the ship became disabled, and part of the coals were obliged to be thrown overboard; and the master chartered another vessel, and transhipped the residue, 850 tons, on board of her, at 45s. per ton freight to Rangoon. On arrival at Rangoon the master of the latter vessel offered the coals to B.'s agent on payment of 45s. per ton freight. This offer being refused, the master put up the coals for auction, and B.'s agent *bonâ fide* bought them at the price of L.1, 5s. a ton. It was held (in the Exchequer Chamber, on appeal from the Queen's Bench), by Erle, C.J., Willes, J., and Channell, B., that the property in the coals passed to B. on A.'s shipping the coals on board, and delivering to B. the bills of lading and policy of insurance; and that A. having done this was entitled to retain the half of the invoice price that had been paid to him; and that A. was bound to have delivered to B. at Rangoon so much of the coals as had escaped the sea risk and arrived there; but that the offer of the coals at Rangoon on the terms of paying 45s. per ton freight was not a delivery by A. according to his contract, consequently that A. was not entitled to demand from B. any part of the residue of the invoice price; and, *semble*, by Willes, J., that B. might sue A. for the non-delivery at Rangoon, and recover as damages the difference between L.1, 5s. per ton, which B. actually paid to get the coals, and the L.1, 2s. 6d. which B. was to have paid under the contract. It was held, by Martin, B. and Pigott, B., that the property in the coals did not pass to B.; but that, by the special terms as to payment, A. was entitled to keep the half price paid him, but that he could not recover more, since he had not delivered the coals at Rangoon pursuant to his contract. And it was held, by Williams J., that the property in the coals passed to B. on the shipment and delivery of the shipping documents; but that A. was bound to deliver the coals at Rangoon, and that as he had not done so, B. was entitled to recover back the half price paid, and also any damages sustained by A.'s breach of contract in not delivering the coals.—(*The Calcutta and Burmah Steam Navigation Company (Limited) v. De Mattos, et e contrâ (in error)*, 33 L. J., Q. B. 214.)

MARINE INSURANCE.—In a policy of marine insurance, effected on a printed form, on ship, merchandise, etc., on board the said ship, there was a clause, 'the said ship, etc., goods, merchandise, etc., for so much as concerns the

assured by agreement between the assured and assurers in the policy are and shall be valued at as under,' the last two words being added in writing; and some way further down the policy, in the margin, was written '1800L.,' and in the body 'on freight warranted free of caption, seizure,' etc. It was held, this was not a valued policy. Erle, C. J.: In order to ascertain what the actual loss is, there arises the question, What is the value of the property insured? In an open policy, that depends on the real value of the property. But it is at the option of the parties to dispense with this *ex post facto* proof, by saying beforehand that they agree that the value of the subject of insurance shall be a sum certain; and then the policy is called valued, and the effect is the same as if the sum inserted had been proved to be the value of the thing insured. But this agreed value must be shown on the face of the policy; and in all the policies I have ever seen, I think I may say that the invariable practice is, when it is intended that the policy shall be 'valued,' after stating the sum insured, to add, 'valued at the same,' or at so much, adding the same or a greater sum.—(*Wilson v. Nelson*, 33 L. J., Q. B. 220.)

SHIPPING.—The power of the master of a ship to bind his owners personally is but a branch of the general law of agency; and where the master of a ship contracts as such in a French port to carry goods for a foreigner, his authority to bind his owners is that conferred by the law of the country to which the ship belongs; and in the case of a French contract is subject to defeasance on the abandonment of the ship and freight; and the flag of the ship is notice to all the world that his implied authority is limited by the law of that flag. Blackburn, J.: There is a singular absence of authority on this subject in our own Courts, but the point has twice come before the Courts in America, and the decisions are opposed to each other. In *Arago v. Currell* (1 Louis. Rep. 528) the Court in Louisiana held, that the limit of the liability of the owners of a Louisiana ship was governed by the law of Mexico, where the contract was made by their master, and not by the law of Louisiana, treating the question as one depending on the law of nations. In the more recent case of *Pope v. Nickerson* (3 Story's Rep. 465), in a case very similar in its facts to the present case, the Court of Massachusetts dissented from *Arago v. Currell*. Mr Justice Story delivered an elaborate judgment, in which he collects and examines the Continental authorities, as well as those of England and America, and he treats the question as depending on the law of agency, and comes to the conclusion that the limit of the liability of the owners for the acts of their master depended upon the law of Massachusetts, where the ship was owned, and not on the law of the country where she was chartered, or of that where the goods of the plaintiffs were sold by the master.—(*Lloyd v. Guibert*, 33 L. J., Q. B. 241.)

RAILWAYS CLAUSES ACT.—Where a railway is carried over a highway by means of a bridge, no liability to keep in repair the immediate approaches on each side of the bridge is cast upon the company by reason of any of the provisions in the Railways Clauses Consolidation Act, 1845, even though the company have lowered the level of the old highway in making those approaches.—(*London and North-Western Rail. Co. v. The Surveyor of Highways for the Township of Skerton*, 33 L. J., M. C. 158.)

ACQUIESCENCE.—A. B. and C. D. occupied adjoining houses, and C. D., intending to erect a glass-room as a photographic studio on a portion of his premises, called on A. B. and informed him of his intention, pointing out the situation, etc., but this was done after dark on a spring evening. He also said he had a plan of the erections, and a contract for their performance. A. B. made no objection, being, as he alleged, under the impression that the new buildings were to be in a different situation, but never made further inquiries, nor asked to see the plan. C. D. commenced his preparations eleven days afterwards, and about a week later commenced the actual building. About a week after this A. B. discovered his mistake as to the position of the new buildings, and four days later wrote to C. D. to desist, and threatened proceedings

in the Court of Chancery if compliance were refused. Eight days afterwards, and when the buildings were nearly complete, A. B. filed a bill against C. D. On appeal it was held, by the Lords Justices (dissenting from Wood, V.C.), that there was no such acquiescence as would deprive A. B. of his right to relief. *Semble*—A stronger case of acquiescence is requisite to debar a plaintiff from relief at the hearing of a cause than to disentitle him to an interlocutory injunction.—(*Johnson v. Wyatt*, 33 L. J., Ch. 394.)

REAL OR PERSONAL.—In a mining lease, besides an annual surface rent, certain half-yearly payments, described as 'further consideration-money,' and depending upon the rate of working the mines, were reserved to the lessor, his heirs and assigns; and it was held, on the death of the lessor intestate, that these payments were not purchase-money passing to the personal representative of the lessor, but in the nature of rent, to which therefore the heir became entitled as incident to the reversion.—(*Barrs v. Lea*, 33 L. J., Ch. 437.)

COMPANY.—One of the directors of a company, established under the Joint-Stock Companies Act, 1844, and having definite borrowing powers, made advances (not in accordance with the borrowing powers) to meet the necessary expenses of carrying on the concern. Subsequently the company, after being registered as a limited company under the Joint-Stock Companies Act, 1856, was voluntarily wound up. It was held the director was entitled to rank as a creditor of the company, and to receive payment next after the general creditors, in the event of there being any assets.—(*Lowndes v. The Garnett and Mosely Gold Mining Co. of America (Limited)*, 33 L. J., Ch. 418.)

DOMICIL.—Testator, having a Scotch domicil of origin, went to India in 1840, where he purchased a coffee plantation, and continued to reside and carry on his trade till 1858, when, on account of ill health, he came over to this country, and resided here and in Scotland for eighteen months, after which he returned to his plantation in India, and lived there till his death in 1860. It was held, testator had acquired an Anglo-Indian domicil, which was not changed at the time of his death, and that his property was not liable to legacy duty. *Semble*—The circumstance that a foreign fixed residence is adopted merely with the view to the acquisition of a fortune, and with an ulterior intention of returning home, is not sufficient to prevent the place of residence from becoming that of domicil. Kindersley, V.C.: I was struck with the decision of the Master of the Rolls in the unreported case of *Jopp v. Wood*, in which it does not appear that *Moorhouse v. Lord* (32 L. J. Rep. (N. S.) Chanc. 295, S.C. Law Times, N. S. 212) was cited. I must say that, according to what I had always considered the true doctrine of domicil to be, where a man goes to a colony not intending to make that the permanent residence of himself and family, but for a temporary purpose, and for acquiring a fortune, he retains his original domicil, and the Master of the Rolls seems to have come to that conclusion. On the one hand, then, I find the Master of the Rolls, in accordance with my own notions of abandonment and acquisition of domicil, has so held; but, on the other hand, I have the case of *Moorhouse v. Lord*, in which Lord Cranworth, Lord Chelmsford, and Lord Kingsdown concurred in the opinion that Dr Cochrane had clearly abandoned his Scotch domicil. Under such circumstances, I have no power to hold that Mr Cannon did not acquire an Anglo-Indian domicil.—(*Allardice v. Onslow*, 33 L. J., Ch. 434.)

INJUNCTION.—Previous to 1859 there had been but one siding at the place, and it was on the opposite side of the line from the property of S. In 1859 the company constructed a second siding, on the side of the line nearest to the property of S., and used it for carrying manure from London, of an offensive description. S. remonstrated from time to time, but in 1862, finding the nuisance greatly increased, in the month of May he made a formal complaint. Obtaining no redress, he, after a demand by his solicitors, filed, in January 1863, his bill for an injunction and for an inquiry as to damages. One of the Vice-Chancellors considered that the plaintiff having had ample time to estab-

lish his right at law, and having failed to do so, was not entitled to file a bill for an injunction, and dismissed the bill with costs. On appeal, the Lords Justices held, that there had not been a nuisance so continuous and systematic as to justify the grant of the injunction, and they agreed to the dismissal of the bill, but without prejudice to plaintiff's right to an action, and without costs, and gave no costs of the appeal.—(*Swaine v. The Great Northern Rail. Co.*, 38 L. J., Ch. 399.)

INSURANCE AGAINST FIRE.—The fire policies issued by an insurance company provided that the company would not be responsible for any losses by explosion, except explosion by gas. A vessel laden with gunpowder took fire and exploded, and the concussion of the air caused considerable damage to the property, more especially to windows and glass, of persons who had effected insurances with the company. The directors having decided to pay the losses thus occasioned, a bill was filed by one of the shareholders seeking an injunction to restrain the directors from so applying the funds of the company; and it was held, that assuming the company not to be legally liable, yet, as the evidence proved that payment of such losses, as of favour, was in accordance with the course pursued by other companies in the particular case, and with the usual custom of fire insurance companies, the directors must be regarded as acting fairly within the limits of their authority for the benefit of the company, and the bill was dismissed with costs. The distinction between an application of the funds of a company to a purpose not falling properly within the objects of the company, and a gratuitous payment out of the funds thereof in the ordinary course of business, pointed out and explained. Wood, V.C. : Mr James put the case of a school, and asked whether, if the company subscribed to a school, that was a legitimate mode of conducting business. I meet that in this way : that if a number of insurance offices made donations to schools in the ordinary way of carrying on their business, any other insurance office might do the same thing. So, again, with a dinner. If they started with a dinner, as some companies do, giving invitations to their friends to come to a meeting for the purpose of giving notoriety to their business, that is solely a matter to be judged of by the ordinary custom and mode of conducting business. If that is the ordinary mode of carrying on business, then this shareholder, the plaintiff, has contracted to carry it on in the ordinary way. And if you put an extreme case, as that of a man having died who is insured against loss by fire, and a claim being made as if there had been a life insurance, the answer to that would be that that is not the way in which business is conducted, and that no insurance company ever did anything of the kind.—(*Taunton v. The Royal Insurance Co.*, 33 L. J., Ch. 406.)

INSURANCE ON LIFE.—Policies of assurance containing a proviso making them void in case of the death of the assured by his own hand, except to the extent of the interest of an assignee for value, were mortgaged, together with other property, as security for a sum far exceeding the value of the policies. The assured, in a fit of insanity, committed suicide. The assurers paid the money due on the policies to the mortgagee, and afterwards filed a bill, praying that the sums paid by them might be charged on the other property included in the mortgage, or, at all events, that the mortgage moneys might be apportioned amongst all the property comprised in the mortgage; and that if the mortgaged premises other than the policies should prove insufficient to raise the amount the plaintiffs might be declared entitled to, plaintiffs might stand as creditors in respect of the deficiency against the general assets of the assured. It was held, that the above-mentioned proviso was for the benefit of the assured, and not merely for the protection of an assignee for value; also, that the plaintiffs were principal debtors in respect of what was due upon the policies; and therefore were entitled to none of the relief prayed.—(*The Solicitors and General Life Assurance Society v. Lamb*, 33 L. J., Ch. 426.)

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PUBLIC GENERAL STATUTES

· RELATING TO SCOTLAND,

PASSED IN THE

TWENTY-SEVENTH AND TWENTY-EIGHTH YEARS

OF THE REIGN OF HER MAJESTY

QUEEN VICTORIA.



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ANNO VICESIMO SEPTIMO

VICTORIÆ REGINÆ.

CAP. XVIII.

An Act to grant certain Duties of Customs and Inland Revenue.—[13th May 1864.]

Stamp Duties.

IX. For the Purposes of this Act with respect to the Duty on Insurances against Loss or Damage by Fire, 'Stock in Trade' shall be understood and deemed to mean Goods, Wares, and Merchandise in the Possession of the Manufacturer thereof for Sale, or in the Possession of any Manufacturer as Materials to be used for the Purpose, or in the Process of any Manufacture, or in the Possession of any Trader for Sale in the course of his Trade, or in the Possession of any Person on behalf of such Manufacturer or Trader, or in the Possession of a licensed Pawnbroker, being Goods received by him in Pledge.

Definition
of 'Stock
in Trade.'

X. In every Policy by which any Insurance from Loss or Damage by Fire shall be made or renewed upon any Stock in Trade, Machinery, Implements, or Utensils subject to the reduced Rate of yearly Per-centage Duty by this Act imposed, such Stock in Trade, Machinery, Implements, and Utensils, and the Sum or Sums insured thereon, shall be specified and set forth separately from all other Property on which any Insurance shall be made by the same Policy, and the Quarterly Accounts required by Law to be kept and rendered by Persons, Corporations, and Companies insuring against Fire shall contain a separate and distinct Account of all such Insurances as aforesaid, and of the Sums insured thereby respectively, and all other Particulars relating thereto required by Law to be specified or contained in such Quarterly Accounts: Provided that where in any Policy existing at the Time of

Property
insured
subject to
the reduced
Rate of
Duty to be
disting-
guished in
the Policy
and also in
the Quar-
terly Ac-
counts.

Property
and Sums

insured thereon, may be distinguished by Memorandum on existing Policies.

Ad valorem Duty chargeable on 'Settlements' payable under 18 & 14 Vict. c. 97, defined.

Settlement of Sums of Money secured by Bonds, Debentures, and other Securities chargeable.

The Value of Shares in Stocks and

the passing of this Act Property insured subject to the said reduced Rate of Duty shall not be separately and distinctly specified as herein required, it shall be lawful to distinguish the same and the Sum or Sums insured thereon by any Memorandum to be written or endorsed in or upon such Policy.

XI. Whereas by an Act passed in the Thirteenth and Fourteenth Years of the Reign of Her present Majesty, Chapter Ninety-seven, certain *ad valorem* Stamp Duties were granted and made payable under the Head of 'Settlement' in the Schedule thereto in respect of any definite and certain Principal Sum or Sums of Money, and any definite and certain Share or Shares in any of the Government or Parliamentary Stocks or Funds, or in the Stocks and Funds of the Governor and Company of the Bank of *England* or of the Bank of *Ireland*, or of the *East India* Company, or of the *South Sea* Company, or of any other Company or Corporation: And whereas it is expedient to explain and amend the said Act as herein-after mentioned: Be it enacted, That the said Duties so granted and made payable as last aforesaid shall be deemed to extend to and shall be chargeable upon or in respect of any definite and certain Principal Sum or Sums of Money of any Denomination or Currency, whether *British*, Foreign, or Colonial, and any definite and certain Share or Shares in the Stocks or Funds of any Foreign or Colonial Government, State, Corporation, or Company whatsoever, as well as upon or in respect of the Shares, Stocks, and Funds specified in the said last-mentioned Schedule.

XII. And where any Principal Sum of Money secured or contracted for by or which may become due or payable upon any Bond, Debenture, Policy of Insurance, Covenant, or Contract shall be settled or agreed to be settled, or such Bond, Debenture, Policy, Covenant, or Contract shall be settled, or assigned or transferred by way of Settlement, or shall be agreed so to be, then and in any of such Cases the same shall be deemed to be a Settlement of such Principal Sum of Money, and shall be chargeable with the said *ad valorem* Stamp Duties on the Amount thereof accordingly: Provided always, that where the Subject of any Settlement shall be a Policy of Insurance, then, if there shall not be any certain Covenant, Contract, or Provision made for keeping up such Policy, or for paying the Premiums which may become payable in that Behalf, the said *ad valorem* Duty shall be chargeable only on the Value of such Policy at the Date of such Settlement.

XIII. And where the Subject of any Settlement chargeable with the said Duties shall be any Share or Shares in

any such Stocks or Funds as aforesaid, or any Sum or Sums of Money secured by any Foreign or Colonial Bond, Debenture, or other Security bearing a marketable Value in the *English* Market, then the Value of such Share or Shares, and of such Bond, Debenture, or other Security respectively, shall be ascertained and determined by the average selling Price thereof on the Day or on either of the Ten Days preceding the Day of the Date of the Deed or Instrument of Settlement, or if no sale shall have taken place within such Ten Days, then according to the average selling Price thereof on the Day of the last preceding Sale, and the said *ad valorem* Duties shall be chargeable on such Settlement in respect of the Value so ascertained and determined; and the Value of any Sum or Sums of Money expressed in Coin of a Foreign or Colonial Denomination or Currency shall be determined by the current Rate of Exchange on the Day of the Date of the Deed or Instrument of Settlement, and the said *ad valorem* Duties shall be chargeable in respect of the Value so determined as last aforesaid.

Funds, and of Sums secured by Foreign or Colonial Securities, and of Sums expressed in Foreign or Colonial Currency, how ascertained and determined.

XIV. The Stamp Duty by this Act imposed on a Voting Paper as described in Schedule (C.) to this Act may be denoted by an adhesive Stamp, in like Manner as the Stamp Duty on an Instrument appointing a Proxy; and all Provisions and Regulations relating to the Particulars to be inserted in such last-mentioned Instrument, or to the cancelling or obliterating an adhesive Stamp affixed thereto, and all Penalties for any Neglect or Omission to comply with any such Provisions or Regulations, or for making or signing any such Instrument on Paper not duly stamped, or for voting or attempting to vote under any such Instrument not duly stamped, shall be deemed to apply and shall be observed and enforced, *mutatis mutandis*, in relation to any such Voting Paper as aforesaid.

Provisions and Regulations relating to Proxies to apply to Voting Papers.

Income Tax.

XV. And whereas under and by virtue of the Fortieth Section of the Act passed in the Sixteenth and Seventeenth Years of Her Majesty's Reign, Chapter Thirty-four, Persons liable to the Payment of Rent, yearly Interest, or any Annuity or other annual Payment therein mentioned, are entitled and authorized on making such Payment to deduct and retain thereout the Amount of the Rate of Income Tax which shall be payable at the Time when such Payment becomes due: Be it enacted, That the Persons liable to and making any such Payment as aforesaid shall be entitled and are hereby authorized to deduct and retain thereout the Amount of the Rate or a proportionate Amount

Income Tax levied under Sec. 40 of 16 & 17 Vict. c. 34, to be deducted from Rent, Interest, etc., at the Rate payable during the Period when the same was accruing.

of the several Rates of Income Tax which were chargeable by Law upon or in respect of such Rent, Interest, Annuity, or other annual Payment, or the Source thereof, during the Period through which the same was accruing due, anything in the said recited Act to the contrary notwithstanding.

SCHEDULE (C.)

Containing the Duties of Stamps granted by this Act in lieu of the Stamp Duties now chargeable on the several Instruments, Matters, and Things in this Schedule mentioned.

Fire Insurance.

In lieu of the yearly Per-centage Duty now chargeable for or in respect of any Insurance from Loss or Damage by Fire only, which shall be made or renewed on or after the Twenty-fifth day of June One thousand eight hundred and sixty-four, of or upon any Goods, Wares, or Merchandise, being Stock in Trade, or of or upon any Machinery, Fixtures, Implements, or Utensils used for the Purpose of any Manufacture or Trade, there shall be charged and paid yearly a Duty at and after the Rate of One Shilling and Sixpence per Annum for every One hundred Pounds insured; and when any such Insurance as aforesaid shall be made or renewed at any Time between the Twenty-second Day of April One Thousand eight hundred and sixty-four and the said Twenty-fifth Day of June, for any Period of Time extending beyond the said last-mentioned Day, there shall be charged and paid for and in respect of the Time intervening between the making or renewing of the said Insurance and the said Twenty-fifth Day of June, the yearly Per-centage Duty at and after the Rate chargeable on the said Twenty-second Day of April, and for and in respect of any subsequent Period, including the said Twenty-fifth Day of June, the Rate of Duty chargeable according to this Resolution; and no Return or Allowance of Duty, except at and after the last-mentioned Rate, shall be made in respect of Time unexpired, or otherwise, on any such Insurance as aforesaid which shall have been made or renewed before the said Twenty-second Day of April One thousand eight hundred and sixty-four.

Letters or Powers of Attorney, Proxies, etc. (that is to say),

For and upon any Letter or Power of Attorney :

For the Sale, Transfer, or Acceptance of any of the Government or Parliamentary Stocks or Funds :

If the value of such Stocks or Funds shall exceed

L.20

L.1 0 0

And if such Value shall not exceed L.20

0 5 0

For the Receipt of Dividends or Interest of any of the Govern-

ment or Parliamentary Stocks or Funds, or of the Stocks, Funds, or Shares of or in any Joint Stock Company or other Company or Society whose Stocks or Funds are divided into Shares and transferable :

If the same shall be for the Receipt of One Payment only L.0 1 0

And if the same shall be for a continuous Receipt, or for the Receipt of more than One Payment 0 5 0

For the Receipt of any Sum of Money, or any Cheque, Note, or Draft for any Sum of Money not exceeding L.20 (except in the Cases aforesaid), or any periodical Payment (other than as aforesaid), not exceeding the annual Sum of L.10 0 5 0

Letter or Power of Attorney, Commission, Factory, Mandate, or other Instrument in the Nature thereof :

For the sole Purpose of appointing, nominating, or authorizing any Person to vote as a Proxy or otherwise at One Meeting of the Proprietors or Shareholders of any Joint Stock or other Company, or of the Members of any Society or Institution, or of the Contributors to the Funds thereof, or at One Meeting of any Body exercising a public Trust in the United Kingdom, or to vote at One Parish Meeting of Heritors or Proprietors of Real or Heritable Property in Scotland L.0 0 1

Voting Paper (that is to say),

Any Instrument for the Purpose of voting by any Person entitled to vote at any such Meeting as aforesaid in any Part of the United Kingdom 0 0 1

For and upon any Letter or Power of Attorney made by any Petty Officer, Seaman, Marine, or Soldier serving as a Marine, or by the Executors or Administrators of any such Person—

For receiving Prize Money or Wages L.0 1 0

For and upon any Letter or Power of Attorney of any other Kind or Commission or Factory in the Nature thereof 1 10 0

EXEMPTIONS.

Any Letter of Attorney for the Receipt of Dividends of any definite and certain Share of the Government or Parliamentary Stocks or Funds producing a yearly Dividend of less than L.3.
Any Letter or Power of Attorney or Proxy filed in any Ecclesiastical Court.

Appointments to Ecclesiastical Benefices, etc.

For and upon any Donation or Presentation, by whomsoever made, of or to any Ecclesiastical Benefice, Dignity, or Promotion :
Also for and upon any Collation by any Archbishop or Bishop or

Property, Profits, and Gains mentioned or described as chargeable in the Act passed in the Sixteenth and Seventeenth Years of Her Majesty's Reign, Chapter Thirty-four, for granting to her Majesty Duties on Profits arising from Property, Professions, Trades and Offices, the following Rates and Duties (that is to say),

For every Twenty Shillings of the Annual Value or Amount of all such Property, Profits, and Gains (except those chargeable under Schedule (B.) of the said Act), the Rate or Duty of Sixpence.

And for and in respect of the Occupation of Lands, Tenements, Hereditaments, and Heritages chargeable under Schedule (B.) of the said Act, for every Twenty Shillings of the annual Value thereof—

In England the Rate or Duty of Threepence :

And in Scotland and Ireland respectively the Rate or Duty of Twopence farthing :

Subject to the Provisions contained in Section Three of an Act passed in the last Session of Parliament, Chapter Twenty-two, for the Exemption of Persons whose whole Income from every Source is under One hundred Pounds a Year, and the Relief of those whose Income is under Two hundred Pounds a Year.

CAP. XIX.

An Act to enable Joint Stock Companies carrying on Business in Foreign Countries to have Official Seals to be used in such Countries.—[13th May 1864.]

WHEREAS there have been and may be established in the United Kingdom Companies whose Business is to be carried on in Countries not situate in the United Kingdom, and it is convenient and desirable that Investments may be made, and Mortgages, Conveyances, and Leases taken, and Contracts and Engagements entered into, on behalf of the Company, in such Countries, in the Name of the Company : Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. This Act may be cited for all Purposes as 'The Short Title. Companies Seals Act, 1864.'

II. Any Company, under 'The Companies Act, 1862,' whose Objects require or comprise the Transaction of Business, as herein-before mentioned, in Foreign Countries, may cause to be prepared an Official Seal for and to be

Power to
Companies
to have an
Official
Seal.

used in any Place, District, or Territory situate out of the United Kingdom, in which the Business of the Company shall be carried on, and every such Official Seal may and shall be a Fac-simile of or as nearly as practicable a Fac-simile of the Common Seal of the Company, with the Exception that on the Face thereof shall be inscribed the Name of each and every Place, District, or Territory in and for which it is to be used: Provided that it shall be lawful for any such Company as aforesaid from Time to Time to break up and renew any Official Seal or Seals, and to vary the Limits within which it is intended to be used.

Power to
Companies
to appoint
Agents
abroad to
affix Seals.

III. Every Company having or using any such Official Seal as is authorized by this Act may from Time to Time, by any Instrument or Instruments in Writing under the Common Seal of the Company, empower any Agent or Agents specially appointed for the Purpose, or any local Agent, Board, Committee, Manager, or Commissioner, appointed under the Provisions of the Articles of Association of such Company, in any Place, District, or Territory situate out of the United Kingdom where the Business of the Company shall for the Time being be carried on, to affix such Official Seal to any Deed, Contract, or other Instrument to which the Company is or shall be made a Party in such Place, District, or Territory, and no other Order of the Company or the Board of Directors thereof shall be necessary to authorize any such Seal to be affixed to any Deed, Contract, or other Instrument.

As to the
Duration of
Powers
granted
under
Sec. 3 of
this Act.

IV. Every Power granted under the last preceding Section shall, as between the Company, their Successors and Assigns, on the one hand, and the Person or Persons dealing with the Agent or Agents, Board, Committee, Manager, or Commissioner named in the Instrument conferring the Power, and all Parties claiming through or under such Person or Persons, on the other hand, continue in force during the Period, if any, mentioned in the Instrument conferring the Power, or if no Power be there mentioned then until Notice of the Revocation or Determination of the Power shall have been given to such Person or Persons as aforesaid.

Person
affixing
Seal to
Document
to certify
the Date
when so
affixed.

V. Whenever any such Official Seal as aforesaid shall be affixed to any Document, the Person affixing the same shall, by Writing under his Hand, and written on the Document to which the Seal may have been affixed, certify the Date when and the Place where the same was affixed; and any Document to which any such Seal shall have been duly affixed within the District or Territory or Place the Name whereof is inscribed on such Seal shall bind the

Company in the same Way and to the same Extent and have the same Force and Effect as if it had been duly sealed with the Common Seal of the Company.

VI. The Powers given by this Act shall be exercised by such Companies only as are or shall be expressly authorized to exercise the same by their Articles of Association, or a special Resolution passed according to the Provisions of 'The Companies Act, 1862,' and shall be exercised by such Companies subject to any Directions or Restrictions in their Articles of Association or the special Resolutions contained.

Companies not to exercise Powers of Act unless authorized.

VII. Nothing in this Act contained shall operate to repeal the Provisions of the Fifty-fifth Section of 'The Companies Act, 1862,' but such Section shall continue in force, and all Acts done or to be done thereunder shall be as valid and effectual as if this Act had not been passed.

Section 55 of 25 & 26 Vict. c. 89, not repealed.

CAP. XXX.

An Act to provide for the Alteration of the Circuits of the Court of Justiciary in Scotland, and for holding additional Circuit Courts.—[23d June 1864.]

WHEREAS it is expedient to make Provision for altering the Circuits of the Court of Justiciary in *Scotland*: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. It shall be lawful for Her Majesty in Council, from Time to Time as Her Majesty in Council may think fit, to alter the Circuits of the Court of Justiciary in *Scotland*, or any of them, to form new Circuits, to fix and determine the Limits of each existing or new Circuit, and the Counties or Portions of Counties, Cities or Burghs, and Districts, which shall be included within the same, to detach any County or Portion of a County from any Circuit, and to include the same in any other existing or new Circuit, and also to fix and determine the Places at which the Circuit Courts shall be held within each such Circuit, and to alter such Places: Provided always, that Circuit Courts shall continue to be held at such Towns as are appointed for keeping and holding Circuit Courts by an Act of the Parliament of *Scotland*, Number Forty, made in the Year One thousand six hundred and seventy-two, in-

Power to Her Majesty in Council to alter Circuits of Court of Justiciary in Scotland.

intituled *An Act concerning the Regulation of Judicatories*, and an Act passed in the Twentieth Year of His Majesty King George the Second, Chapter Forty-three, intituled *An Act for taking away and abolishing the Heritable Jurisdiccions in Scotland*.

Orders in Council to be published, and Date of taking effect.

II. Every Order to be made by Her Majesty in Council in pursuance of this Act shall be published in such Manner as Her Majesty in Council may direct, and shall take effect from the Date thereof, or from such other Date as may be specified therein: Provided always, that before any such Order shall be made for altering the present Arrangement, Notice thereof shall be published in the *Edinburgh Gazette* at least Three Months previously, and an Opportunity given to be heard thereon to the Lord Lieutenant, the Sheriffs, Justices of Peace, Commissioners of Supply, and the Magistrates of Burghs of the Counties to be affected by the proposed Change.

Power to Court of Justiciary to make Orders and Regulations.

III. It shall be lawful for the Judges of the Court of Justiciary, and they are hereby required, from Time to Time, to make such Orders and Regulations, and to pass such Acts of Adjournal, as may be necessary for carrying into effect the Provisions of this Act, and of any Order to be made by Her Majesty in Council in pursuance thereof.

CAP. XXXIII.

An Act to facilitate the Commutation and Sale of certain Vicarage Teinds in Scotland.—[30th June 1864.]

Parl. 1
(1688) of
Charles I.
cc. 17, 19.

WHEREAS by Two Acts, being respectively the Seventeenth and Nineteenth of the First Parliament of His Majesty King Charles the First, held at *Edinburgh* in the Year Sixteen hundred and thirty-three, Provision was made for the Valuation and Sale of Teinds, Parsonage and Vicarage, to those Persons liable in Payment of the same, except in so far as such Teinds had been previously assigned to the Minister serving the Cure: And whereas by the Thirtieth Act of the Second Session of the First Parliament of Their Majesties King William and Queen Mary, held at *Edinburgh* in the Year Sixteen hundred and ninety, intituled *An Act and Commission for Plantation of Kirks and Valuation of Teinds*, it was, *inter alia*, enacted, that the Rules contained in the foresaid Acts for the Valuation and Sale of Teinds shall extend to all Teinds, 'except such as belong to and are possess by Ministers for their Stipends and Provisions, which are only to be valued, but not to

Parl. 1,
Sess. 2
(1690), of
Will. &
Mar. c. 80.

be sold or bought.' And whereas by the Ninth Act of the Fourth Session of Queen *Anne's* First Parliament, held at *Edinburgh* in the Year Seventeen hundred and seven, intituled *Act anent Plantation of Kirks and Valuation of Teinds*, it was, *inter alia*, enacted, that the Lords of Council and Session shall judge, cognosce, and determine in all Affairs and Causes whatsoever which by the Laws and Acts of Parliament of the Kingdom of *Scotland* were formerly referred to and did pertain and belong to the Jurisdiction and Cognizance of the Commissioners for Plantation of Kirks and Valuation of Teinds: And whereas there are several Parishes in *Scotland* in which Vicarage Teinds on Fish are payable to the Ministers, and form Part of their Stipends; and it is expedient that Provision should be made for the Commutation of such Teinds: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Parl. 1,
Sess. 4
(1707), of
Anne, c. 9.

I. This Act may be cited for all Purposes as 'The Fish Teinds (*Scotland*) Act, 1864.'

Short Title.

II. The following Words and Expressions in this Act shall have the Meanings hereby assigned to them:

Interpreta-
tion of
Terms.

'Fish Teinds' shall mean the Vicarage Teinds on Fish payable to the Minister of any Parish in *Scotland*, and forming Part of his Stipend:

'Presbytery' shall mean the Presbytery of the Bounds within which such Parish is situate:

'Sheriff' shall mean the Sheriff of the County in which such Parish is situate, or, in the Case of a Parish situate partly in one County and partly in another, the Sheriff of the County in which the larger Portion of such Parish is situate, and shall include Sheriff Substitute:

'Sheriff Clerk' shall mean the Sheriff Clerk of such County.

III. The Provision in the recited Act of Sixteen hundred and ninety, Chapter Thirty, that Teinds belonging to and possessed by Ministers for their Stipends and Provisions may only be valued, but are not to be sold or bought, shall, as regards Vicarage Teinds on Fish, be and the same is hereby repealed, in so far as inconsistent with the Provisions of this Act, but no further.

Repeal of
Provision
in Act of
1690, c. 30.

IV. In any Parish in which there are Fish Teinds it shall be lawful for the Minister of the Parish, the Presbytery, and the Persons liable in Payment of Fish Teinds, to enter into an Agreement for the Commutation or Redemption of the Fish Teinds, and to contract for the Substitu-

Parties in-
terested -
may com-
mute Fish
Teinds by
Agreement

tion of a Capital Sum to be raised and invested as hereinafter provided.

Persons
liable in
Fish
Teinds
may petition
Sheriff
to call a
Meeting.

V. Any Ten Persons liable in the Payment of Fish Teinds, or who have paid or have been required to pay Fish Teinds within the Period of Twelve Months immediately preceding the Date of the Application after mentioned, or in any Parish where less than Ten Persons are so liable or have been so required to pay Fish Teinds, then the whole of such Persons may apply by Petition to the Sheriff to summon a Meeting of the whole Persons resident in the Parish who are liable in Payment of Fish Teinds, for the Purpose of taking into consideration the Commutation of the Fish Teinds under the Provisions of this Act.

Roll of Persons
liable in Fish
Teinds to
be made
up.

VI. Within Eight Days after the Presentation of such Petition the Sheriff shall pronounce an Order on the Minister of the Parish or the Collector of the Fish Teinds to lodge with the Sheriff Clerk within a Period to be specified in such Order a Roll of the Persons liable or held to be liable in Payment of such Teinds for the Year then current; and after the Roll has been lodged the Sheriff shall direct the same to be printed, and Copies thereof to be affixed for Fourteen Days on the principal Door of the Parish Church and on other public Places within the Parish; and immediately after the Expiry of that Period the Sheriff Clerk shall proceed to revise the Roll, and within Fourteen Days after such Expiry may, on Cause shown, expunge the Name of any Person therefrom, if satisfied that his Name has been erroneously entered therein, but only after giving due Intimation to such Person of the Intention so to do; and the Sheriff Clerk may also, if satisfied that the Name of any Person has been unduly omitted from the Roll, add his Name thereto, and the Roll so revised shall be attested and signed by the Sheriff and Sheriff Clerk, and shall be final and conclusive in regard to all Matters and Things to be done under the Provisions of this Act; and the Roll shall remain in the Custody of the Sheriff Clerk, who shall deliver a Copy thereof to any Person applying for the same, on Payment for such Copy at the Rate of Sixpence for every One hundred Names copied.

Meeting of
Persons
named in
the Roll to
be called
by Sheriff.

VII. On the Completion and Attestation of the Roll the Sheriff shall summon a Meeting of the Persons whose Names are entered therein to be held in some convenient Place within the Parish, and shall intimate the Time and Place for holding such Meeting and the Purpose thereof by Advertisement, signed by the Sheriff Clerk, printed Copies of which shall be affixed on the principal Door of the Parish Church and on other public Places within the Parish, as the Sheriff shall direct, at least Eight Days pre-

vious to the Day of holding such Meeting, and the Sheriff shall preside thereat; and such Meeting may resolve that the Fish Teinds payable in such Parish shall be commuted under the Provisions of this Act, and may approve of any Deed of Agreement between the Minister of the Parish, the Presbytery, and the Persons liable in Payment of Fish Teinds, which may then be submitted for that Purpose, or may resolve to adjourn to a Second Meeting to be held within Twenty-one Days thereafter, in order to prepare and consider any such Deed of Agreement, or may resolve to submit the Terms of such Commutation to Arbitration; and all Questions arising at such Meeting or adjourned Meeting shall be decided by the Votes of a Majority of the Persons present thereat, and whose Names are on the Roll, and such Decision shall be binding on all Persons whose Names are on the Roll.

VII. If it shall be determined by a Majority of the Persons present and voting at such Meeting or adjourned Meeting to approve of such Deed of Agreement, or to enter into a Submission, as herein-after provided, the Meeting or adjourned Meeting shall elect Three of their Number to subscribe such Deed of Agreement or Deed of Submission on behalf of the whole Persons resident in the Parish who are liable in Payment of Fish Teinds, and such Subscription shall bind the whole Persons so liable in all Time coming: Provided that in the event of the Inability by Death or otherwise of any of the Three Persons so elected, the Subscription of the remaining Two shall be as valid and binding as if the Three Persons had subscribed such Deed of Agreement or Deed of Submission.

Meeting may resolve to approve of Agreement or to enter into a Submission.

IX. In the event of the Majority of the Persons present and voting at any such Meeting or adjourned Meeting resolving that a Deed of Submission shall be entered into with the Minister of the Parish and the Presbytery, for the Purpose of having the Fish Teinds commuted, according to the Judgment and Award of One Person as sole Arbiter, such Arbiter shall be chosen and appointed by the Minister of the Parish, the Presbytery, and the Three Persons elected at such Meeting, One Vote being given by the said Three Persons collectively, One Vote by the Minister, and One Vote by the Presbytery.

Submission to One Person as sole Arbiter may be entered into.

X. Any Deed of Agreement or Deed of Submission to be entered into by the Presbytery, under the Provisions of this Act, shall be binding on the Presbytery if signed by the Moderator and Clerk thereof for the Time being with the Authority of the Presbytery.

Presbytery to be bound by Signatures of Moderator and Clerk.

XI. The Arbiter under any such Deed of Submission may take all necessary Proceedings, and allow the Parties

Proceedings before Arbiter.

to lead Evidence and to be heard *vivâ voce*, or to give in Statements in Writing, as he thinks fit; and in his Award he shall fix the Capital Sum to be paid for the Commutation of the Fish Teinds, and the Date at which the same is to be paid, and shall decern for Payment of the Expenses incurred in the Submission; and he may find any of the Parties to the Submission liable in Expenses to any of the other Parties, and may modify the same as he thinks fit; and his Award shall be final and binding on all the Parties to the Submission.

Agreement
or Final
Award to
be recorded
in Sheriff
Court
Books.

XII. Within Three Weeks after any Deed of Agreement has been completed, or after any Final Award has been pronounced and issued, under the Provisions of this Act, the same shall be transmitted to the Sheriff Clerk, and shall be recorded in the Sheriff Court Books of the County; and all Expenses incurred by the Sheriff Clerk in the Execution of this Act, including reasonable Remuneration for his Trouble (to be fixed by the Sheriff in case of Difference), shall be paid by the Persons resident in the Parish who are liable in Payment of Fish Teinds.

Capital
Sum to be
raised and
invested on
Heritable
Security.

XIII. The Capital Sum fixed by such Deed of Agreement or by the Award of the Arbitrator shall be raised and provided by the Persons resident in the Parish who are liable in Payment of Fish Teinds, and shall, under the Direction of the Sheriff and of the Procurator and Agent of the Church of *Scotland*, be invested on approved Heritable Security, in the Names of the Moderator and Clerk of the Presbytery and of the Procurator of the said Church, all for the Time being, and their Successors in Office, as Trustees for the Management of the said Capital Sum; and the said Trustees shall, after Deduction of any necessary Expenses, pay over half-yearly the Interest accruing on the said Capital Sum to the Minister of the Parish for the Time being, and they may from Time to Time change the said Security, and re-invest the said Capital Sum on approved Heritable Security in the Names of the Trustees for the Time being.

Payment
of Fish
Teinds
to cease
after Com-
mutation.

XIV. In any Parish in which the Fish Teinds have been commuted, and the said Capital Sum has been raised and invested, under the Provisions of this Act, all Right on the Part of the Minister of the Parish to collect or receive Fish Teinds, and all Liability for the Payment of Fish Teinds, shall cease and determine from and after the Date of such Deed of Agreement or Award, as the Case may be, or from and after any other Date which may be specified therein respectively, and in all Time coming.

Where
Submission
has been

XV. Wherever in any Parish where Fish Teinds are payable a Submission has, before the passing of this Act,

been entered into by the Minister of such Parish, the Presbytery and those liable in the said Teinds, or Persons authorized to act for them for the Commutation of the said Teinds and for a Settlement of any Arrears of the said Teinds, or for either of such Purposes, and there has been an Award under such Submission finding the capital Sum for which the said Teinds shall be commuted and the Terms on which such Arrears, if any, shall be settled, then the said Submission and the said Award and the Findings comprised therein shall be held valid and binding on the Parties to the said Submission, and it shall be competent to any of such Parties to lay the said Submission and Award before the Sheriff of the County in which such Parish is situated, and the Sheriff, after such Intimation as he shall think fit, shall inquire into and determine whether the said Submission has been entered into by the proper Parties or by Persons duly authorized to act for them, and whether the Questions submitted have been ascertained and decided by the said Award; and the said Sheriff shall have Authority to direct the Sheriff Clerk of the said County to engross the said Award in the Sheriff Court Books in the said County, and to fix the Costs of all Proceedings before him, and such Deliverance shall be final and conclusive, and thereupon such Award shall be as binding and effectual as if it had been specially ratified by this Act.

entered into by Minister of any Parish before passing of this Act, Presbytery to be bound by Award, &c.

CAP. XXXVII.

An Act to amend and extend the Act for the Regulation of Chimney Sweepers.—[30th June 1864.]

WHEREAS by the Act of the Session of the Third and Fourth Years of Her Majesty Queen Victoria (Chapter Eighty-five), 'for the Regulation of Chimney Sweepers and Chimneys,' Provision was made to prevent any Person compelling or knowingly allowing a Child or young Person under the Age of Twenty-one Years to ascend or descend a Chimney or enter a Flue for the Purpose of sweeping, cleaning, or coring the same, or for extinguishing Fire therein :

8 & 4 Vict.
c. 85.

And whereas it is expedient to amend in some Particulars and to extend the said Act (hereafter in this Act called the Principal Act) :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this pre-

sent Parliament assembled, and by the Authority of the same, as follows :

General.

Short
Titles.

I. This Act may be cited as 'The Chimney Sweepers Regulation Act, 1864;' the Principal Act may be cited as 'The Chimney Sweepers and Chimneys Regulation Act, 1840;' and the Principal Act and this Act may be cited together as 'The Chimney Sweepers and Chimneys Regulation Acts, 1840 and 1864.'

Com-
mencement
of Act.

II. This Act shall commence and take effect on the First Day of *November* One thousand eight hundred and sixty-four.

Interpreta-
tion of
Terms.

III. In this Act—

The Term 'Sheriff' includes Stewart :

The Term 'Chimney Sweeper' means a Person using the Trade or Business of a Chimney Sweeper.

This Act
to be con-
strued with
Principal
Act.

IV. This Act shall be construed together with the Principal Act as One Act, and for this Purpose the Expression 'This Act' when used in the Principal Act shall be taken to include the present Act.

Applica-
tion of
Penalties.

V. Any pecuniary Penalty recovered under this Act shall be applied as directed in the Principal Act.

Protection of Children and young Persons.

Restriction
on Employ-
ment of
Children
under Ten.

VI. It shall not be lawful for a Chimney Sweeper to employ a Child under the Age of Ten Years to do or assist in doing any Work or Thing in or about the Trade or Business of such Chimney Sweeper elsewhere than within the House or Place of Business of such Chimney Sweeper, or the Yard or Buildings (if any) connected therewith.

Chimney
Sweepers
entering
Houses to
sweep
Chimneys,
etc., not to
bring with
him Per-
sons under
Sixteen.

VII. It shall not be lawful for a Chimney Sweeper, on any Occasion of his entering a House or Building for the Purpose of sweeping, cleaning, or coring a Chimney or Flue therein or belonging thereto, or for extinguishing Fire in any such Chimney or Flue, to cause or knowingly allow a Person under the Age of Sixteen Years in his Employment or under his Control to enter before, with, or after him into any Part of such House or Building, or to be therein for any Part of the Time during which such Chimney Sweeper himself continues therein for any such Purpose as aforesaid.

Penalties
for before-
named
Offences.

VIII. If any Chimney Sweeper acts in contravention of either of the foregoing Enactments, he shall for every such Offence be liable to a Penalty not exceeding Ten Pounds.

Power to
Justices to
impose

IX. Where under Section Two of the Principal Act a Chimney Sweeper is convicted of the Offence of compelling or knowingly allowing a Person under the Age of Twenty-

one Years to ascend or descend a Chimney or enter a Flue for any Purpose in that Section mentioned, the Justices or Sheriff before whom he is convicted may, in lieu of the Imposition of any such pecuniary Penalty as is authorized by that Section, adjudge the Offender to be imprisoned in the Common Gaol or House of Correction for any Term not exceeding Six Months, with or without Hard Labour.

Imprisonment.

X. In any Prosecution of a Chimney Sweeper for any Offence against the Principal Act, or against this Act, where the Age of any young Person or Child comes in question, the Proof of the Age of such young Person or Child shall lie on the Defendant.

Burden of Proof of Age to lie on Chimney Sweeper.

XI. Section Two of the Principal Act shall be read as if the Words 'or less than Five Pounds' were omitted therefrom.

Abolition of minimum Penalty.

CAP. XLIII.

An Act to grant additional Facilities for the Purchase of small Government Annuities, and for assuring Payments of Money on Death.—[14th July 1864.]

WHEREAS under the Act Sixteenth and Seventeenth Victoria, Chapter Forty-five, Deferred Annuities of small Amounts can only be granted upon the Condition that the full Amount required to purchase such Annuities shall be paid in One Sum, or by annual Payments during a Course of Years fixed at the Time of Purchase: And whereas under the said Act Contracts for Payment of a Sum of Money on Death cannot be entered into except upon the Condition that the Party contracting for such Payment on Death shall at the same Time purchase a Deferred Annuity depending upon his or her own Life: And whereas it is expedient to amend the said Act: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

16 & 17
Vict. c. 45.

I. Deferred Annuities, authorized to be granted by the Second Section of the said Act, may be granted upon the Condition, to be fixed at the Time of Purchase, that the Sum required under the said Act to purchase such Annuity shall be payable in smaller Instalments and at shorter Periods than are now fixed by the said Act.

Deferred Annuities may be granted if Sum required be paid in smaller Instalments.

Such Annuities may be granted to Extent of 50*l*.

Portion of Sect. 10 of recited Act repealed.

Limit on Age of Persons insured.

Limit of Sum insured.

Power to construct fresh Tables for Annuities and Insurances.

II. Annuities authorized to be granted under the Second Section of the said Act may be granted in Amounts exceeding the Limit of Thirty Pounds fixed by the said Act, but no such Annuity shall be granted to any One Person to an Amount exceeding Fifty Pounds *per Annum*.

III. So much of the Tenth Section of the said Act as requires that a Deferred Annuity shall be purchased by any Person contracting with the Commissioners for the Reduction of the National Debt for Payment of a Sum of Money on Death shall be and the same is hereby repealed.

IV. No Contract for a Payment on Death shall be entered into by or on behalf of any Person under the Age of Sixteen or over the Age of Sixty Years.

V. No Contracts for Payment to be made on the Death of any One Person under this and the said Act shall be for a greater Amount in the whole than One hundred Pounds, or of a less Amount than Twenty Pounds.

VI. Whereas by the Sixteenth Section of the said Act it is enacted, that the Commissioners of Her Majesty's Treasury may from Time to Time direct the Commissioners for the Reduction of the National Debt to use and adopt such Tables as shall from Time to Time be authorized and approved of by the said Commissioners of the Treasury for the Grant of Annuities and for Payment of Sums of Money to be secured at Death under the Provisions of the said Act: And whereas it is expedient that the Fund to be formed by the Receipt of Sums on account of all such Contracts effected under the said Act and this Act shall be adequate to meet all Claims accruing and to accrue thereon, so as to render certain the Fulfilment of all Engagements to Persons contracting for such Annuities or Payments on Death, or for any Compositions or Sums agreed to be granted upon the Lapse of any Contract, without entailing any Charge in respect thereof, or in respect of Costs and Expenses on the Consolidated Fund of the United Kingdom: Be it enacted, therefore, That the said Commissioners of Her Majesty's Treasury shall cause Tables to be constructed in accordance with the Principles above recited, upon which Annuities or Payments on Death shall be contracted for under the said Act and this Act, and the said Tables shall be framed, first, for such Contracts as shall provide for the Consideration Money in One Sum; second, for such Contracts as shall provide for the like Payments in annual Sums; and, third, for such Contracts as shall provide for the like Payments by more frequent Instalments; and such Tables, when the Commissioners of Her Majesty's Treasury have approved of the same, shall, together with a Statement of the Rules observed in constructing them, be

laid before both Houses of Parliament for Thirty Days before they shall be acted upon; and if any Address shall be presented to Her Majesty from either House of Parliament praying that such Tables may be revoked and cancelled, such Tables shall be revoked and cancelled accordingly; and thereupon the Commissioners of Her Majesty's Treasury shall order other Tables to be framed for their Approval in lieu of the Tables so revoked and cancelled. The Tables for Payments on Death shall be calculated, so far as the Interest of Money is concerned, at the Rate of Three *per Centum per Annum*.

VII. Until the Tables made in pursuance of this Act can be legally acted on, this Act shall not come into force so far as to enable any Grant to be made of an Insurance on the Life of any Person or any Grant to be made of any Annuity the Consideration Money for which is paid by Instalments more frequent than annual Instalments.

This Act
not to come
in force
until
Tables can
be legally
acted on.

VIII. In case any Person who shall contract under the Provisions of the said Act and of this Act for a Payment to be made at Death, after having paid the several Premiums for a Period of not less than Five Years, shall desire to surrender his Policy, or shall make default in the Payments stipulated to be made according to the Contract, the Commissioners for the Reduction of the National Debt, at the Option of the Party beneficially interested in the Contract, shall pay to such Person such Sum of Money, not being less than One Third of the Premiums paid by him, as shall be fixed by the Regulations authorized to be framed under the Provisions of this Act, or shall grant to him such a paid-up Policy of Assurance, or such an Immediate or Deferred Life Annuity, under the Tables in force under the Authority of the said Act or this Act, as shall be equivalent in Value to the Sum which under the Provisions of this Act would be paid to him in Money; but it shall also be lawful for the said Commissioners, if they think fit, to enter into Contracts for Payments to be made at Death, on the Condition that no Portion of the Premiums paid are to be returnable; and no Premium shall be returned in pursuance of this Section in respect of any Contract so made.

Provision
in case of
Default by
Purchasers
after Five
Years Pay-
ments.

IX. For the Purposes of this Act and of the said Act, every Person purchasing an Annuity, or having purchased the same under the Provisions of the said Act, or contracting for the Payment of a Sum of Money on his or her Death, shall be considered as a Depositor in a Savings Bank; and all the Provisions of the Acts now in force relating to Savings Banks, in as far as the same can or may be applicable, shall apply to the Parties having purchased or purchasing such Annuities, or contracting for the Pay-

Purchasers
liable to
Provisions
of existing
Savings
Banks
Acts.

ment of Money on Death, and to the Rules and Regulations to be made for carrying the same into effect: Provided always, that nothing in this Act or the said Act contained shall be held to exempt any Person or Persons entering into a Contract for a Payment on Death, or any Person or Persons becoming beneficially interested therein, from Probate or any Stamp Duty payable by Law.

Jurisdic-
tion of
County
Court.

X. If Payment of any Sum of Money due on a Contract made under this Act for Payment of Money on Death shall be refused by the Commissioners for the Reduction of the National Debt, the Party beneficially interested therein may, if he think fit, instead of proceeding to Arbitration in manner provided by the said Savings Banks Acts, take Proceedings against the said Commissioners for the Reduction of the National Debt in the County Court of the District in which such Contract was entered into, or with the Consent of the said Commissioners in any other County Court in the Jurisdiction of which such Party may be resident, for the Recovery of the Amount; and any County Court in which Proceedings under this Section may be taken shall have Jurisdiction in the Matter, and the Decision thereupon shall be final and binding on all Parties to all Intents and Purposes, and without any Appeal; and for the Purposes of this Act the Contract shall be deemed to have been entered into at the Place where the Party insured resided at the Time at which the Contract bears Date. For the Purpose of Arbitration under the said Acts relating to Savings Banks, the said Commissioners shall when necessary be deemed to be in the Place of the Trustees of the Savings Banks. In *Scotland* the Sheriff Court, and in *Ireland* the Civil Bills Court of the Chairman of Quarter Sessions, shall have the same Jurisdiction as is given by this Section to the County Court.

Jurisdic-
tion of
Courts in
Scotland
and Ire-
land.

Assign-
ment of
Contracts.

XI. Any Person who shall contract under the Provisions of this Act and of the said Act for a Payment to be made at Death may, after having duly paid for Five Years or upwards the Premiums thereon, assign his Right and Interest therein, upon Payment of such Fee and on such Conditions as shall be fixed by Regulations made under the Authority of this Act. The Assignee of such Contract shall take, both at Law and in Equity, all such Right and Interest therein, including the Right to sue, as was possessed by the Assignor, but no other or greater Right or Interest.

Commis-
sioners not
to be
affected by
Notice
of Trusts.

XII. The Commissioners shall not, except in so far as is provided by the said Act, receive or be affected by Notice, however given, of any Trust affecting any Annuity, or any Contract for Payment on Death, made in pursuance of this and the said Act.

XIII. The Commissioners for the Reduction of the National Debt, with the Consent of the Commissioners of Her Majesty's Treasury, may make Regulations for fixing the Amounts of the several Instalments and Premiums, and the Periods at which such Instalments and Premiums shall be paid, in respect of the Purchase Money payable upon all Contracts which shall be made under the Authority of this and the said Act, but so as not to affect any Contract previously made; and no Sum in respect of Instalments or Premiums payable at any One Time shall be of less Amount than Two Shillings.

Commissioners for Reduction of National Debt to regulate Instalments.

XIV. The Postmaster General, with the Consent of the Commissioners of Her Majesty's Treasury, may, if he shall think fit, authorize and direct such of his Officers as he may select to receive such Monies as may become payable upon Contracts entered into under this and the said Act for Investment with the Commissioners for the Reduction of the National Debt, and to pay on behalf of the said Commissioners all such Monies as may become due and payable under such Contracts.

Power to Postmaster General, with Consent of Treasury, to authorize his Officers to receive Monies.

XV. The Commissioners for the Reduction of the National Debt may, in like Manner, with the Consent of the said Commissioners of Her Majesty's Treasury, if they shall think fit, authorize the Trustees of Savings Banks established under the Act of the Twenty-sixth and Twenty-seventh *Victoria*, Chapter Eighty-seven, with Consent of such Trustees, to receive such Monies as may become payable upon Contracts entered into under this Act for Remittance to the Commissioners for the Reduction of the National Debt, and to pay on behalf of the said Commissioners all such Monies as may become due and payable under such Contracts, and may make to the said Trustees a reasonable Allowance for their Expenses, in respect of such Transactions, out of the Monies so received and paid over by the said Trustees to the said Commissioners.

Power to Commissioners to give Authority to Trustees of Savings Banks.

XVI. The Postmaster General, with the Consent of the Commissioners of Her Majesty's Treasury, may make all Regulations for carrying out the Provisions of this Act, in so far as his Department is concerned; and the Commissioners for the Reduction of the National Debt, with the Consent of the said Commissioners of Her Majesty's Treasury, may make Regulations for carrying out the Provisions of this Act so far as the Trustees of Savings Banks are concerned, and also for the Execution of Contracts on behalf of the said Commissioners, by any Officer or Officers appointed by the said Commissioners for that Purpose, or appointed by the Postmaster General, with the Consent of the said Commissioners; and all Regulations

Power to Postmaster General, with Consent of Treasury, to make Regulations for carrying out Provisions of this Act.

made by the said Postmaster General and the said Commissioners for the Reduction of the National Debt respectively shall be binding to the same Extent as if such Regulations formed Part of this Act; and Copies of all Regulations issued under the Authority of this Act shall be laid before both Houses of Parliament.

Accounts
of Post-
master
General
and Com-
missioners
to be sub-
mitted to
Commis-
sioners for
auditing
Public
Accounts.

XVII. The annual Accounts of the Postmaster General and of the Commissioners for the Reduction of the National Debt to the Thirty-first Day of *December* in each Year, in respect to all Monies received or invested under the Authority of this Act, shall annually, prior to the Thirty-first Day of *March* in each Year, be submitted by the said Postmaster General and by the said Commissioners for Examination and Audit to the Commissioners for auditing Public Accounts.

CAP. XLVIII.

An Act for the Extension of the Factory Acts.—[25th July 1864.]

WHEREAS it is expedient to provide for the effectual cleansing and Ventilation of the Factories in which are carried on the Manufactures and Employments specified in the First Schedule hereto, and for the Regulation of the Labour of the Children, Young Persons, and Women employed therein: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Preliminary.

Short
Title.

I. This Act may be cited for all Purposes as the 'Factory Acts Extension Act, 1864.'

Applica-
tion of Act.

II. This Act shall apply only to the several Manufactures and Employments mentioned in the said First Schedule.

Definition
of 'Factory
Acts.'

III. The Factory Acts shall mean such Provisions as are now in force of the Acts following; that is to say,
An Act passed in the Fourth Year of the Reign of His late Majesty, Chapter One hundred and three, intitled *An Act to regulate the Labour of Children and Young Persons in the Mills and Factories of the United Kingdom*:

An Act passed in the Seventh Year of the Reign of Her

present Majesty, Chapter Fifteen, intituled *An Act to amend the Laws relating to Labour in Factories* :

An Act passed in the Fourteenth Year of the Reign of Her present Majesty, Chapter Fifty-four, intituled *An Act to amend the Acts relating to Labour in Factories* :

An Act passed in the Seventeenth Year of the Reign of Her present Majesty, Chapter One hundred and four, intituled *An Act further to regulate the Employment of Children in Factories* :

An Act passed in the Twentieth Year of the Reign of Her present Majesty, Chapter Thirty-eight, intituled *An Act for the further Amendment of the Laws relating to Labour in Factories*.

Sanitary Measures.

IV. Every Factory to which this Act applies shall be kept in a cleanly State, and be ventilated in such a Manner as to render harmless so far as is practicable any Gases, Dust, or other Impurities generated in the Process of Manufacture that may be injurious to Health.

Factory to be well cleansed and ventilated.

If the Occupier of any Factory fails to keep the same in conformity with this Section, he shall be deemed to be guilty of an Offence against this Act, and to be subject in respect of such Offence to a Penalty not exceeding Ten Pounds nor less than Three Pounds.

The Court having Jurisdiction under this Act may, in addition to or instead of inflicting any Penalty in respect of an Offence under this Section, make an Order directing that within a certain Time to be named in such Order certain Means are to be adopted by the Occupier for the Purpose of bringing his Factory into conformity with this Section; the Court may upon Application enlarge any Time appointed for the Adoption of the Means directed by the Order, but any Non-compliance with the Order of the Court shall, after the Expiration of the Time as originally limited or enlarged by subsequent Order, be deemed to be a continuing Offence, and to be punishable by a Penalty not exceeding One Pound for every Day that such Non-compliance continues.

Special Rules.

V. In order to prevent the Requirements of this Act as to Cleanliness and Ventilation in a Factory being infringed to the Detriment of the Occupier by the wilful Misconduct or wilful Negligence of the Workmen employed therein, it shall be lawful for the Occupier of any Factory to make Special Rules for compelling the Observance amongst his Workmen of the Conditions necessary to insure the re-

Special Rules for Regulation of Workmen in Factories.

quired Degree of Cleanliness and Ventilation, and to annex to any Breach of such Rules a Penalty not exceeding One Pound.

The Special Rules made in pursuance of this Section shall not be of any Validity until they have been approved by One of Her Majesty's Principal Secretaries of State.

Printed Copies of the Special Rules in force in any Factory shall be hung up in a legible Condition in Two or more conspicuous Places in the Factory, and a printed Copy shall be supplied to any Person employed in the Factory who may apply for a Copy.

A printed Copy of the Special Rules for the Time being in force in any Factory certified under the Hand of the Inspector for the Time being having Jurisdiction over such Factory shall be Evidence of such Rules, and of their having been approved by the said Secretary of State, and it shall be the Duty of the above-mentioned Inspector to certify Copies of Special Rules when required.

Application of Factory Acts.

The Factory Acts, as set out in Sect. 8, incorporated with this Act, and to apply to Manufactures, &c., in First Schedule.

VI. The Factory Acts shall be incorporated with this Act, and shall apply to the several Manufactures and Employments mentioned in the said First Schedule, with the Qualifications and subject to the Additions herein-after mentioned :

- (1.) The Term 'Factory' as used in this Act and in the Acts incorporated herewith shall mean in respect of the Manufactures and Employments to which this Act applies the Premises in that Behalf specified in the Second Schedule annexed to this Act, but all other Terms in this Act shall have the same Meaning as is assigned to them in the Factory Acts :
- (2.) During the First Six Calendar Months next ensuing the passing of this Act Children of not less than Eleven Years of Age may be employed for the same Time, and subject to the same Conditions, for and subject to which Young Persons exceeding Thirteen Years of Age may be employed in pursuance of the said Factory Acts :
- (3.) During the First Thirty Calendar Months next ensuing the passing of this Act Children of not less than Twelve Years of Age may be employed for the same Time, and subject to the same Conditions, for and subject to which Young Persons exceeding Thirteen Years of Age may be employed in pursuance of the said Factory Acts :
- (4.) In the Manufacture of Lucifer Matches, no Child, Young Person, or Woman shall be allowed to take

his or her Meals in any Part of the Factory where any Manufacturing Process (except that of cutting the Wood) is usually carried on ; and any Child, Young Person, or Woman who is allowed to take his or her Meals in any Part of the Factory in contravention of the said Provision shall be deemed to be employed contrary to the Provisions of the Factory Acts :

(5.) In the Employment of Fustian Cutting no Child shall be allowed to commence Work until the Attainment of the Age of Eleven Years ; and any Child who is allowed to commence Work in the Employment of Fustian Cutting before the said Age of Eleven Years shall be deemed to be employed contrary to the said Factory Acts :

(6.) During the First Eighteen Calendar Months next ensuing the passing of this Act so much of the said Factory Acts as provide that during any Time allowed for Meals no Child, Young Person, or Woman shall be employed or allowed to remain in any Room in which any Manufacturing Process is carried on, and that all the Young Persons employed in a Factory shall have the Time for Meals at the same Period of the Day, shall not apply to the Employment of Paper Staining, or to the Manufacture of Earthenware ; subject to this Proviso, that, in the Case of the Manufacture of Earthenware, at no Time after the passing of this Act shall any Child, Young Person, or Woman be allowed to take his or her Meals, or to remain during any Time allowed for Meals, in the Dipping Houses, Dippers' Drying Rooms, or China-scouring Rooms :

(7.) Whereas by the said Act of the Session of the Seventh and Eighth Years of the Reign of Her present Majesty, Chapter Fifteen, Section Eighteen, it is provided, amongst other Things, that all the inside Walls, Ceilings, or Tops of Rooms, whether plastered or not, and all the Passages and Staircases of every Factory which shall not have been painted with Oil once at least within Seven Years, shall be limewashed once at least within every successive Period of Fourteen Months, to date from the Period when last white-washed : Be it enacted, That, in the Case of the Manufacture of Earthenware, the above-recited Provision shall not apply to those Parts of the Factory which are solely used for the Storage of Earthenware, and in which no Work is carried on except such as is by the Custom of the Trade incidental to such Storage or necessary for keeping the Earthenware in a fit State for Sale.

Recovery
and Appli-
cation of
Penalties.

VII. All Penalties under this Act, including Penalties for Breach of a Special Rule, shall be recoverable and applied in manner in which Penalties are recoverable and applicable under the said Factory Acts, and the Term 'Court' as used in this Act shall include any Justices, Sheriff, or other Magistrate having Jurisdiction in respect of such Penalties.

SCHEDULES to which the foregoing Act refers.

FIRST SCHEDULE.

Manufactures and Employments to which Act applies.

The Manufacture of Earthenware, except Bricks and Tiles, not being ornamental Tiles.
The Manufacture of Lucifer Matches.
The Manufacture of Percussion Caps.
The Manufacture of Cartridges.
The Employment of Paper Staining.
The Employment of Fustian Cutting.

SECOND SCHEDULE.

Definition of the Word 'Factory.'

In the Manufacture of Earthenware, except as aforesaid :
Any Place in which Persons work for Hire in making or assisting in making, finishing or assisting in finishing, Earthenware of any Description.

In the Manufacture of Lucifer Matches :

Any Place in which Persons work for Hire in making Lucifer Matches, or in mixing the Chemical Materials for making them, or in any process incidental to making Lucifer Matches, except the cutting of the Wood.

In the Manufacture of Percussion Caps :

Any Place in which Persons work for Hire in making Percussion Caps, or in mixing or storing the Chemical Materials for making them, or in any Process incidental to making Percussion Caps.

In the Manufacture of Cartridges :

Any Place in which Persons work for Hire in making Cartridges, or in any Process incidental to making Cartridges, except the Manufacture of the Paper or other Material that is used in making the Cases of the Cartridges.

In the Employment of Paper Staining :

Any Place in which Persons work for Hire in printing a Pattern in Colours upon Sheets of Paper

either by Blocks applied by Hand, or by Rollers worked by Steam, Water, or other Mechanical Power.

In the Employment of Fustian Cutting:

Any Place in which Persons work for Hire in Fustian Cutting.

For the Purposes of this Act an Apprentice shall be deemed to be a Person working for Hire.

No Building or Premises used solely for the Purpose of a Dwelling House shall be deemed to be a Factory or Part of a Factory within the Meaning of this Act.

CAP. LIII.

An Act to make Provision for Uniformity of Process in summary Criminal Prosecutions and Prosecutions for Penalties in the Inferior Courts in Scotland.—[25th July 1864.]

WHEREAS by an Act passed in the Ninth Year of the Reign of King George the Fourth, intituled *An Act to authorize additional Circuit Courts of Justiciary to be held, and to facilitate Criminal Trials, in Scotland*, Provision was made for the summary Prosecution of Offences before Sheriffs of Counties in certain Cases; which Act was amended by an Act passed in the Eleventh Year of the Reign of King George the Fourth and the First Year of the Reign of King William the Fourth, intituled *An Act to amend an Act of the Ninth Year of His late Majesty King George the Fourth, to facilitate Criminal Trials in Scotland, and to abridge the Period now required between the pronouncing of Sentence and Execution thereof, in Cases importing a Capital Punishment*: And whereas by an Act passed in the Nineteenth and Twentieth Year of the Reign of Her present Majesty, intituled *An Act for amending the Procedure before Magistrates and Justices of Peace in Scotland*, the Provisions of the recited Acts with respect to summary Prosecutions were in certain Cases made applicable to Prosecutions before Justices of the Peace in Scotland: And whereas by an Act passed in the Seventh Year of the Reign of King William the Fourth and the First Year of the Reign of Her present Majesty, intituled *An Act for the more effectual Recovery of Small Debts in the Sheriff Courts, and for regulating the Establishment of Circuit Courts for the Trial of Small Debt Causes by the Sheriffs in Scotland*, Provision was made for the Recovery

9 G. 4. c.
29.

11 G. 4. &
1 W. 4. c.
87.

19 & 20
Vict. c. 48.

7 W. 4 & 1
Vict. c. 41.

of statutory Penalties by way of Action in the Sheriff Court in certain Cases : And whereas it is expedient to make further and more effectual Provision for the Trial of Offences punishable on summary Conviction, and for the summary Recovery of Penalties in the Inferior Courts in *Scotland* : Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Short
Title.

Interpreta-
tion of
Terms.

I. This Act may be cited for all Purposes as 'The Summary Procedure Act, 1864.'

II. The following Words in this Act shall have the Meanings hereby assigned to them, unless such Meanings shall be excluded by the Subject or Context :

'Act of Parliament' and 'Act' shall mean any Public General or Local and Personal Act of Parliament now in force or hereafter to be passed :

'Court' shall mean any Sheriff Court or Burgh Court, or any Court of Justices of the Peace for any County or City in *Scotland*, whether in Quarter or Petty Sessions, any Police Court having Jurisdiction, or any Sheriff, Magistrate of any Burgh, or Justice or Justices of the Peace for any County or City in *Scotland*, exercising Jurisdiction, under the Authority of any Act of Parliament, in any Matter which may lawfully be brought before him or them in the Manner provided by this Act :

'Judge' shall mean any Sheriff, or any Magistrate of any Burgh, or any Justice of the Peace, whether acting alone or in conjunction with any other Justice or Justices of the Peace for the same County or City in *Scotland* :

'Magistrate' shall mean any Magistrate of any Burgh in *Scotland* having Jurisdiction :

'Sheriff' shall include Sheriff Substitute :

'Justice' shall mean any of Her Majesty's Justices of the Peace for any County or City in *Scotland* acting within such County or City :

'Clerk of Court' shall include Depute Clerk or other Person acting as such :

'Witness,' shall include Haver :

'Oath' shall include Affirmation in Cases where Affirmations may lawfully be taken in place of Oaths :

'Penalty' shall mean any sum of money which may, under the Authority of any Act of Parliament, be recoverable from any Person in respect of the Contravention of any statutory Requirement or Prohibition,

and also any Sum which may, under the Provisions of any Act of Parliament, be recoverable as a Penalty or Forfeiture, whether such Sum shall be payable to the Party complaining, prosecuting, or suing for the same, or shall be payable in whole or in part to any other Person, or be applicable to any other Use, and whether the Amount thereof is fixed by such statutory Provision, or is so fixed subject to a Power to modify or mitigate, or is in the Nature of a Penalty not exceeding a certain Sum, to be awarded by the Court or Judge who may take cognisance thereof:

'Administrators of Police' shall mean any Commissioners, Town Council, or other body having the Charge or Management of the Police of a Town under the Powers created by any Act of Parliament.

III. The Provisions of this Act may be applied to—

Applica-
tion of the
Act.

- (1.) All Proceedings before any Sheriff, Justices or Justice, or Magistrate in *Scotland* in virtue of the summary Jurisdiction conferred upon them, or any of them, in relation to the Trial of Offences and Recovery of Penalties, by the recited Acts, or any of them:
- (2.) All Proceedings to be taken before any Sheriff, Justices or Justice, or Magistrate in *Scotland* for the Prosecution of any Person who has committed, or is charged with having committed, any Offence or Act for which, under the Provisions of any Act of Parliament, he is liable, upon summary Conviction before any Sheriff, Magistrate, Justices or Justice, to be imprisoned or fined, or otherwise punished, or to be ordered to do or perform any Act, and to be imprisoned in default of Performance:
- (3.) All Proceedings for the Recovery of any Penalty, or Sum of Money in the Nature of a Penalty, which, under the Provisions of any Act of Parliament, may be recovered by summary Complaint or Information, or by Pounding or Distress and Sale, or other summary Process or Diligence of the like Nature, before any Sheriff, Justices or Justice, or Magistrate:
- (4.) All Proceedings for the Trial or Prosecution for any Office, or for the Recovery of any Penalty, under any Act of Parliament by which it shall be provided that Offences committed in contravention thereof or Penalties thereby imposed shall be prosecuted or recovered under the Provisions of this Act.

IV. All Proceedings for summary Conviction for any Offence, whether at Common Law or under any Act of Parliament, and all Proceedings for the Recovery of any Penalty which may be sued for or recovered in a summary

Proceed-
ings to be
instituted
by Com-
plaint

as in Schedule.

Form, whether such Proceedings are at the Instance of a public or private Prosecutor or Complainer, may be instituted by way of Complaint in one or other of the Forms set forth in the Schedule (A.) to this Act annexed; and it shall not be necessary to mention in any Complaint any Act of Parliament other than the Act declaring the Offence for which a Conviction is sought, or imposing the Penalty or Forfeiture which is claimed; and it shall be sufficient to refer to the Act or Section of the Act founded on, without setting forth the Enactment in Words at Length; and where it is necessary that any such Complaint should be made upon Oath of the Complainer, or of a credible Witness, such Oath may be in the Form of Schedule (B.) to this Act annexed; and all Penalties for the Recovery of which in *Scotland* no special Provision has been made by Act of Parliament may be sued for by the Procurator Fiscal of the Jurisdiction.

No Objection to be allowed to Complaint in point of Form, &c.

Power to Court to direct Amendment of Complaint, if it thinks fit.

V. No Objection shall be allowed by the Court to any Complaint under this Act for any alleged Defect therein in Substance or in Form, or for any Variance between any such Complaint and the Evidence adduced on the Part of the Prosecutor or Complainer at the Hearing thereof, not changing the Character of the Offence charged; but if any such Objection or Variance shall appear to the Court to be such that the Respondent has been thereby deceived or misled, it shall be lawful for the Court to adjourn the Hearing to some future Day, and at the same Time, or at any stage of the Proceedings, to direct such Amendment to be made upon the Complaint as may appear to be requisite, not changing the Character of the Offence, and such Amendment shall be authenticated by the Signature or Initials of the Judge or Clerk of Court.

Respondent may be cited to appear or apprehended on a Warrant.

VI. On such Complaint being laid before the Court it shall be lawful for the Court to grant Warrant to cite the Respondent, by delivering a Copy of the Complaint with Warrant of Citation to him personally, or, if he cannot on Search be found personally, leaving such Copy at his usual Place of Abode, to appear before the Court on Induciae of not less than Forty-eight Hours, or (where Apprehension is competent) to grant a Warrant for the Apprehension and interim Detention of the Respondent: Provided that where the Complaint shall pray for a Warrant of Apprehension, the Court may in its Discretion grant, in place of such Warrant, a Warrant for the Citation of the Respondent as aforesaid; and it shall be lawful to annex to such Warrant of Citation or Apprehension a Warrant to cite Witnesses and Havers for both Parties, and also (where such Procedure is otherwise competent) a Warrant to

search for, seize, remove, and secure all Goods, Documents, or other Articles mentioned or referred to in the Complaint.

VII. If the Respondent after being cited shall fail to appear at the Time and Place mentioned in the Warrant of Citation, it shall be lawful for the Court, upon Proof that the Respondent has been duly cited, to issue a Warrant in the Second Instance for his Apprehension and interim Detention, or the Court may adjourn the Hearing to a future Diet, with Liberty to the Respondent to appear at such adjourned Diet, and may in its Discretion appoint Intimation of such adjourned Diet to be made to the Respondent; and in Cases where the Complaint concludes for a pecuniary Penalty only in the First Instance, or where the Act of Parliament founded on authorizes Procedure without the Presence of the Respondent, the Court may, without adjourning, proceed to hear and dispose of the Complaint in the Absence of the Respondent.

Court may proceed in absence of Respondent in certain Cases, or issue a Warrant for his Apprehension.

VIII. Every Warrant granted under the Authority of this Act for the Citation or Apprehension of a Respondent, or for the Citation of Witnesses, or for the Apprehension of a Witness, as herein-after Provided, may be lawfully and competently executed at any Place within the County in which it is granted, and that either by an Officer of the Court or Magistrate granting the Warrant, or by a Constable acting under the Authority of any Act of Parliament, although addressed to Officers of the Court issuing the Warrant, and at any Place within *Scotland* by any Constable or other Officer of the Law, or by an Officer of the Court or Magistrate granting the same; and all such Warrants and Citations may be in the Forms contained in the Schedules (C.), (D.), (E.), and (F.) to this Act annexed.

As to Execution of Warrants.

IX. The Provisions of the second-recited Act relative to the Execution of Sentences and of Decrees for Penalties and Expenses beyond the Jurisdiction of the Court or Judge by whom the same have been granted, shall be applicable to the Execution of Convictions and Judgments pronounced under the Authority of this Act; and the Provisions contained in an Act passed in the Eleventh and Twelfth Years of the Reign of Her present Majesty, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to Persons charged with indictable Offences*, for the Enforcement of Warrants granted by Sheriffs and Justices in *Scotland* by Endorsation in *England* and *Ireland*, shall be applicable to Warrants granted by Magistrates of Burghs in *Scotland*; and the said Provisions

As to Execution of Warrants beyond Scotland.

11 & 12
Vict. c. 42.

are also hereby extended and made applicable to all Warrants issued in *Scotland* under the Authority of this Act.

Warrants
may be
issued for
Apprehen-
sion of
Witnesses.

X. If any Person cited as a Witness by a Warrant under the Authority of this Act shall neglect or refuse to appear at the Time and Place appointed by the Warrant, and no just Excuse shall be offered in his Behalf, it shall be lawful for the Court before whom such Person has been cited to appear to issue a Warrant for his Apprehension; or, if the Court shall be satisfied by Evidence upon Oath that it is probable that such Person will not attend without being compelled so to do, it shall be lawful for the Court to issue a Warrant in the First Instance for the Apprehension of such Person; and any Witness who shall wilfully fail to attend after being duly cited, or who shall refuse to be sworn or to be examined on Affirmation, or who after the Oath or Affirmation has been administered to him shall refuse to answer any Question which the Court shall allow, or to produce Documents in his Possession when required by the Court, may be summarily punished for his Contempt by Imprisonment or Fine, such Punishment not exceeding that which the Court would be entitled to award in case of Conviction upon the Complaint.

Respondent may
require
Adjournment of
Diet.

XI. Any Respondent brought before the Court by a Warrant of Apprehension under the Authority of this Act shall be entitled to require a Copy of the Complaint, and also to require that the Hearing shall be adjourned for a Period of not less than Forty-eight Hours; and such Requisitions shall be complied with if made before the Examination of any Witness on the Merits shall have commenced; but no such Requisition shall be competent where a Copy of the Complaint shall have been delivered to the Respondent personally Forty-eight Hours before the Hearing; and any Interlocutor adjourning the Diet may be in the Form No. 1. in the Schedule (H.) to this Act annexed.

Court may
adjourn the
Hearing
and detain
the Re-
spondent.

XII. Subject to the Provisions contained in the preceding Section, no Adjournment of the Hearing shall take place when the Respondent pleads Not Guilty, or at any other Stage of the Proceedings, unless the Court shall think fit to order an Adjournment: Provided, that where the Respondent has been brought into Court upon a Warrant of Apprehension, it shall be lawful for the Court to grant Warrant, in the Form No. 2. in the Schedule (H.) to this Act annexed, to detain him in Prison until the Period to which the Hearing shall be adjourned, or until he finds sufficient Caution to appear at all future Diets of the Court.

As to sign-
ing of Con-

XIII. Any Sheriff, Magistrate, or Justice, though out of his County or Jurisdiction, may sign any Conviction,

Judgment, Warrant, or Interlocutor under this Act, provided the Evidence and every other Proceeding necessary to support such Conviction, Judgment, Warrant, or Interlocutor shall have been had before him when within his County or Jurisdiction.

victions
and War-
rants.

XIV. Where the Respondent shall be present at the Hearing the Substance of the Complaint shall be read to him, and he shall thereupon be required to plead in common Form, and the Respondent may then state Objections to the Competency or Relevancy of the Complaint or Proceedings; and if no Objections are stated, or if such Objections are stated and repelled or are obviated by Amendment of the Complaint or Adjournment of the Diet as herein-before provided, the Respondent's Plea shall then or at such adjourned Diet be recorded, and the Plea, if the same be Guilty, shall be signed by the Respondent, or by a Judge or the Clerk of Court if the Respondent cannot write; and if the Plea be Not Guilty, the Prosecutor or Complainer shall proceed to establish his Complaint by such Evidence as is competent, and the Respondent may, if he think fit, lead such Evidence as is competent, after which the Court shall pronounce Judgment at the same or any adjourned Diet.

Procedure
at Hearing
in Presence
of the Re-
spondent.

XV. Where the Court shall proceed to dispose of the Complaint in the Absence of the Respondent, Judgment shall not be pronounced against him until the Complaint has been established to the Satisfaction of the Court by such Evidence as is competent, unless the Special Act authorizes Conviction in default of Appearance.

Procedure
at Hearing
in Absence.

XVI. It shall not be necessary in any Proceeding under the Authority of this Act to record or to preserve a Note of the Evidence adduced, but the Record shall set forth in the Form of the Schedule (I.) to this Act annexed the Respondent's Plea, if any, the Names of the Witnesses, if any, examined upon Oath or Affirmation, with a Note of any documentary Evidence that may be put in.

Form of
Record.

XVII. The several Forms of Proceeding prescribed by this Act may be either in Writing or printed, or may be partly written and partly printed; and all such Forms as bear reference to any antecedent Form may be either on the same Sheet of Paper therewith, or on a separate Sheet attached to it.

Proceed-
ings may
be either in
Writing or
printed.

XVIII. In Cases of Conviction or Judgment against the Respondent in Prosecutions and Proceedings under this Act, the Sentence of the Court may be in one or other of the Forms contained in the Schedule (K.) to this Act annexed, or as nearly as may be in such Form,

Applica-
tion of
Forms of
Convic-
tion, etc.

according to the Nature and Circumstances of the Complaint, viz. :

- (1.) In Complaints for Offences at Common Law, punishable on summary Conviction, the Sentence of the Court shall be in the Form No. 1 in the said Schedule :
- (2.) In Complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable on summary Conviction to be imprisoned, or to be imprisoned or fined in the Discretion of the Court, the Sentence of the Court awarding Imprisonment shall be in the Form No. 2 in the said Schedule ; or if the Sentence is for a Fine, then in such of the subsequent Forms as may be in accordance with the Provisions of the Act of Parliament :
- (3.) In Complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable to forfeit a Penalty, and in default of Payment thereof to be imprisoned for a Period limited to a certain Time, at the Expiration of which he shall be entitled to Liberation although the Penalty has not been paid, the Judgment of the Court shall be in the Form No. 3 in the said Schedule :
- (4.) In Complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable to a Penalty, which, under the Authority of the Act, may be recovered by Pounding or Distress and Sale, or other summary Process of Execution by Sale, and, in default of Payment or Recovery of the Penalty by such Process of Execution, the Accused is or shall be liable to be imprisoned for a Period limited as aforesaid, the Judgment and Warrant shall be in the Form No. 4 in the said Schedule :
- (5.) In Complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable to a Penalty, which, under the Authority of the Act, may be recovered by Pounding or Distress and Sale, or other summary Process of Execution by Sale, and where the Act also authorizes the Imprisonment of the Accused for a Period limited as aforesaid, then, unless Imprisonment be only authorized in default of Recovery by such Process of Execution, the Judgment of the Court may be in either of the Forms No. 4 or No. 5 in the said Schedule :
- (6.) In Complaints for the Contravention of any Act of Parliament under which the Accused is or shall be liable to a Penalty, and where no special Provision is made for the Recovery thereof, or for the Substitution

of a Term of Imprisonment in default of Payment, and also in all Cases where, under the Authority of any Act of Parliament, such Penalty is or shall be recoverable by Action, Civil Process, or Diligence, the Judgment of the Court shall authorize Execution by Arrestment, Poining and Sale, and Imprisonment (unless Recovery by Imprisonment is excluded by the Terms of the Act), and may be in the Form No. 6 in the said Schedule ; and the Warrant of Imprisonment to be granted in pursuance of any such Judgment may be in the said Form No. 6, and shall authorize the Detention of the Respondent until liberated in due Course of Law ; and in all Cases where, under the Authority of any Act of Parliament, such Penalty is or shall be declared to be recoverable by Arrestment, Poining or Distress and Sale, or Imprisonment, or by any Combination of those Forms of Diligence other than as above provided for, the Judgment of the Court may be expressed in the said Form No. 6, so far as applicable, and no Warrant of Imprisonment shall be issued upon a Judgment in such Form until after the Period allowed for Execution by Arrestment or Poining, except in the event mentioned in the said Form No. 6 :

(7.) In Complaints for the Contravention of any Act of Parliament by which the Court is or shall be authorized to ordain the Person contravening to do or perform any Act other than the Payment of Money, and where, in consequence of failing or neglecting to do or perform such Act, such Person shall be liable to be imprisoned for a Term to be specified in the Warrant of Imprisonment, the Judgment and Warrant may be in the Form No. 7 in the said Schedule ; and such Judgment and Warrant may, if the Act of Parliament so require, be used in combination with a Judgment or Warrant in one or other of the Forms hereinbefore specified, and may, if the Act so require, be combined with a Judgment for Expenses, and Warrant for Recovery thereof, and for Imprisonment in default of Payment, in such Form as may be requisite :

(8.) Any Judgment of Absolvitor to be pronounced in any Complaint or Proceedings under this Act may be in the Form No. 8 in the said Schedule :

Provided that the Court may add to any of the Forms of Conviction or Judgment for any Penalty such Finding of Expenses and Warrant for the Recovery thereof, and such other Finding or Declaration as may be required by the Act of Parliament founded on ; and, if so required, the

Court may add to any Warrant of Imprisonment contained in such Conviction or Judgment, or consequent thereon, a Direction that the Respondent shall be kept to Hard Labour during the whole or Part of the Term of his Imprisonment; and Execution upon any Judgment or Warrant may proceed either upon such Judgment or Warrant itself or upon an Extract issued and signed by the Clerk of Court, which Extract may be in the Form No. 9 of Schedule (K.), or as near as may be thereto.

Imprisonment may be awarded instead of levying Execution by Poinding and Sale.

XIX. In all cases instituted under this Act in which any Penalty is or shall be recoverable by Poinding or Distress and Sale, Arrestment, or other summary Process of Execution, and in which the Respondent is also liable to be imprisoned for a Term to be specified in the Warrant of Imprisonment, either immediately or in default of Recovery of the Penalty by Execution, the Court, in lieu of granting Warrant for Recovery by Poinding and Sale, may issue a Warrant for the immediate Imprisonment of the Respondent for any Term not exceeding the Term specified in the Act of Parliament in one or other of the Forms appended to Nos. 4, 5, and 6 in Schedule (K.); and no Sale shall be made in virtue of a Warrant granted under the Authority of this Act unless the Goods are at the appraised Value, sufficient to satisfy the Sums decerned for, and the Expenses of the Poinding and Sale.

Proceedings subsequent to Conviction.

XX. Where, in consequence of the Requirements of this Act or of any other Act of Parliament, it is necessary that any Warrant of Imprisonment or other Warrant should be granted subsequent to the Conviction or Judgment, or where any other ulterior Proceeding is enjoined, the Forms and Directions respectively appended to the several Forms of Convictions and Judgments in Schedule (K.) may be used and observed so far as the same are applicable, and all such Warrants or ulterior Proceedings may be taken without the Presence of the Respondent.

Signature of One Justice sufficient except to Conviction or Judgment.

XXI. In Cases in which under any Act of Parliament any Matter or Proceeding which may be dealt with under the Forms prescribed by this Act, or which is incidental thereto, is or shall be cognizable by Two or more Justices, it shall be sufficient that any Warrant of Imprisonment or other Warrant or Proceeding prior or subsequent to the Conviction or Judgment shall be subscribed by One Justice, and it shall not be necessary that such Justice shall be or shall have been present at the Hearing of the Complaint, but the Conviction or Judgment shall in all Cases be signed by such Number of Justices present at the Hearing, and concurring in the Result thereof, as may be required by such Act; and in case of an equal Division of

Opinion among the Justices present, the Complaint shall be held to be not proved, and Judgment shall be given for the Respondent; and all Warrants of Citation in Cases which may be dealt with under this Act may be signed by the Clerk of Court, without being laid before a Judge.

XXII. In all Cases of Complaint under this Act for the Recovery of any Penalty it shall be lawful for the Court to make an Award of Expenses without the same being prayed for in such Complaint, but Expenses shall not be awarded to or against any public Prosecutor or Party prosecuting under the Authority of any Act of Parliament for the public Interest unless such Award of Expenses is authorized by such Act: Provided, that in all Cases where a Complaint for the Recovery of a Penalty is at the Instance of a private Complainer, it shall be lawful for the Court before which such Complaint is brought to award Expenses to the successful Party if the Court shall think fit; and such Expenses may be recovered and Imprisonment awarded, in default of Payment or Recovery thereof, in the Manner and Form specified in the said Schedule (K.) in connexion with the several Forms of Convictions and Judgments therein contained, or, if necessary, by a separate Judgment for Expenses in such Form as may be appropriate.

Court may award Expenses to or against private Complainers, although not authorized by Act

XXIII. If, upon any Complaint presented under the Authority of this Act, a Warrant shall be issued for the Imprisonment of the Respondent pursuant to a Conviction or Judgment, and such Respondent shall then be in Prison undergoing Imprisonment for a specified Period, upon a Conviction for any Offence, or for Default in Payment of any Penalty or Expenses, or for Disobedience to any Order of Court, the Warrant of Imprisonment upon such subsequent Conviction or Judgment shall be delivered to the Keeper of the Prison to whom the same shall be directed, and it shall be lawful for the Court granting the same, if it shall think fit, to insert an Order therein to the Effect that the Imprisonment upon such subsequent Conviction or Judgment shall commence at the Expiration of the Imprisonment to which such Respondent shall have been previously sentenced or adjudged.

Warrant of Imprisonment may be framed so as to take effect from the Expiration of a previous Sentence.

XXIV. In all Cases in which no Time is already or shall be hereafter specially limited for instituting any Complaint for the Recovery of any Penalty or Sum of Money, or for Conviction for any statutory Offence punishable on summary Conviction, in the Act of Parliament relating to each particular Case, such Complaint shall be instituted within Six Months from the Time when the Matter of such Complaint arose.

Limitation of Time for bringing Complaints.

Act not to extend to certain Warrants and Proceedings.

XXV. Nothing in this Act shall extend or be construed to extend to any Warrant or Order for the Removal of any poor Person who is or shall become chargeable to any Parish or District, nor to any Information or Complaint or other Proceeding under or by virtue of any of the Statutes relating to Her Majesty's Revenue, or under or by virtue of any statutory Provision for the Recovery of any Rate, Tax, or Impost whatsoever.

Where special Jurisdiction conferred on Police Court, Forms of this Act may be used.

XXVI. In Cases in which, under the Authority of any Act of Parliament, any Conviction may be obtained, or any Warrant Ad factum præstandum or Judgment granted or pronounced, or any Penalty or Expenses recovered, by way of summary Complaint before any Sheriff, Justices or Justice, or Magistrate, and it is also provided therein, or in any other Act of Parliament having reference thereto, that such Conviction or Warrant may be obtained, or Judgment pronounced, or Penalty or Expenses recovered, in any Police Court in *Scotland*, the Proceedings by this Act authorized may be taken in such Police Court with such and the like Remedies by Pounding and Sale, Imprisonment, or otherwise, as are herein provided in the Case of Convictions and Judgments obtained before Sheriffs, Magistrates, and Justices of the Peaces; and the several Forms contained in the Schedules to this Act annexed may be varied so far as may be necessary to render them applicable to such Police Courts.

Jurisdiction of Inferior Courts not to be extended.

XXVII. Nothing in this Act contained shall confer or be construed to confer upon any Sheriff, Justices or Justice, or Magistrate acting under the Authority of this Act any other or more extensive Jurisdiction in relation to any Matter which may be made the Subject of Complaint than is or shall be vested in such Sheriff, Justices or Justice, or Magistrate at Common Law, or under any Act of Parliament empowering them, or any of them, to take cognizance of such Matter of Complaint; nor shall anything in this Act contained affect any Right to sue by way of ordinary Action in the Court of Session or Sheriff Court in *Scotland* for the Recovery of any Penalty or Forfeiture, save and except as to the Right of suing for such Penalty or Forfeiture in the Sheriff Small Debt Court in the Form provided in the fourth-recited Act.

Limits of Civil and Criminal Jurisdiction defined in respect to Proceedings by way of

XXVIII. And whereas much Inconvenience has resulted from the Uncertainty which exists as to the Nature of the Jurisdiction conferred by various Acts of Parliament authorizing Convictions for Offences, and the Recovery of Penalties, and the Enforcement of Orders by Imprisonment, upon summary Complaint before Sheriffs, Justices, and Magistrates in *Scotland*, and it is expedient

to define the Cases in which such Jurisdiction shall be held to be of a Criminal Nature: In all Proceedings by way of Complaint instituted in *Scotland*, in virtue of any such Statutes as are herein-before mentioned, the Jurisdiction shall be deemed and taken to be of a Criminal Nature where, in pursuance of a Conviction or Judgment upon such Complaint, or as Part of such Conviction or Judgment, the Court shall be required or shall be authorized to pronounce Sentence of Imprisonment against the Respondent, or shall be authorized or required in case of Default of Payment or Recovery of a Penalty or Expenses, or in case of Disobedience to their Order, to grant Warrant for the Imprisonment of the Respondent for a Period limited to a certain Time, at the Expiration of which he shall be entitled to Liberation; and in all other Proceedings instituted by way of Complaint, under the Authority of any Act of Parliament, the Jurisdiction shall be held to be Civil: Provided always, that nothing contained in this Act shall be construed to affect the Right of any Party to Proceedings taken under this Act to be examined as a Witness therein, but such Right shall remain as it would have been if this Act had not passed.

summary
Complaint.

XXIX. Where by any Act of Parliament a Power is or shall be given to any Sheriff, Justices or Justice, or Magistrate in the Exercise of Jurisdiction as a Judge of Police to take cognizance of Offences punishable by Fine or Imprisonment, without any Declaration being expressed or implied of the Powers of such Judge of Police in relation to the Punishment of such Offences, it shall be lawful for such Sheriff, Justices or Justice, or Magistrate convicting for an Offence of which he or they may lawfully take cognizance, to sentence the Person convicted to pay a Penalty not exceeding Five Pounds, or, in the Discretion of the Judge, to sentence him to be imprisoned for any Period not exceeding Sixty Days from the Date of Imprisonment, and also to adjudge him to find Caution to keep the Peace for Six Months under a further Penalty of Ten Pounds, and in default of such Caution being found to be imprisoned for a further Period not exceeding Thirty Days.

Sentence
of Police
Judges not
to exceed a
Fine of 5*l.*
or Sixty
Days Im-
prisonment
in Cases
where their
Powers are
not defined
by Statute.

XXX. No Procurator Fiscal, or other Party prosecuting for the public Interest, by Complaint under the Provisions of this or any other Act, shall be liable to pay or be found liable by any Court in a greater Sum than Five Pounds as Damages for or in respect of any Proceedings taken or anything done on such Complaint, or on any Judgment following on such Complaint, unless the Person prosecuting for Damages shall aver and prove that such

As to Ac-
tions of
Damages
against
public Pro-
secutors.

Proceeding was taken or done maliciously and without probable Cause; but the Party suing such Damages shall not be entitled to have any Decreet or Verdict pronounced against such Procurator Fiscal or other Party prosecuting, for any Damages, or Return or Repetition of Penalty or Costs, in case such Prosecutor shall prove at the Trial that the Party suing was guilty of the Offence in respect whereof he had been convicted, or on account of which he had been apprehended, or had otherwise suffered, and that he had undergone no greater or other punishment than was assigned by Law to such Offence; and any such Prosecutor sued as aforesaid may at any Time put an end to the Action, in so far as not founded on Acts done maliciously, and without probable Cause, by tendering Payment of the Sum of Five Pounds as Damages, with the Amount of the Penalty, if recovered, and the Expenses of such Action to the Date of the Tender.

Provisions of 11 & 12 Vict. c. 43, not to be applicable to Proceedings in Scotland.

XXXI. In Cases in which by any Act of Parliament the Provisions of an Act passed in the Eleventh and Twelfth Year of the Reign of Her present Majesty, intituled *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders*, are or shall be made applicable to Complaints or Informations under any such Act, the Provisions of the said Act of the Eleventh and Twelfth Year of Her Majesty's Reign shall not be applicable to any Proceedings under such Act when instituted in *Scotland*, but the Provisions of this Act shall be applicable to all such Proceedings as may, under the Authority of any such Act, be instituted before any Sheriff, Justices or Justice, or Magistrate in *Scotland*.

Proceedings may be in Forms prescribed by this or other Acts.

XXXII. The Proceedings in any Action or Complaint for the Prosecution for Offences or Recovery of Penalties under any Act of Parliament, may either be according to the Form prescribed by such Act or any Act incorporated therewith, or according to the Form prescribed by this Act, or, where such Proceedings are before the Sheriff, according to the Forms prescribed by the first-recited Act.

Court of Justiciary and Court of Session to have Power to pass Acts of Adjournal and Sederunt. Convictions and Warrants not to be

XXXIII. It shall be lawful for the High Court of Justiciary and for the Court of Session respectively from Time to Time to pass such Acts of Adjournal or Acts of Sederunt as may be necessary or proper for carrying into effect the Provisions of this Act, and in particular to regulate the Expenses of Proceedings in the Inferior Courts under this Act, and the Fees payable to Clerks of Court.

XXXIV. No Conviction or Judgment in pursuance of this Act shall be quashed for Want of Form, and no Warrant of Imprisonment or for Poinding and Sale, and no

Extract of Judgment, shall be held void by reason of any Defect of Form therein, provided it be therein mentioned, or may be inferred therefrom, that it is founded or has proceeded on a Conviction or Judgment, and there be a valid Conviction or Judgment to sustain the same.

quashed or held void for Want of Form.

XXXV. Every Action or Prosecution against any Sheriff, Judge, or Magistrate, or against any Clerk of Court, Procurator Fiscal, or other Person, on account of anything done in any Case instituted under this Act, shall be commenced within Two Months after the Cause of Action shall have arisen, unless a shorter Period is fixed by the Special Act, and not afterwards.

Limitation of Actions.

XXXVI. Whereas it is expedient that in Towns where there is no Prison it shall be competent to establish Places of Confinement for Prisoners undergoing short Sentences without incurring the Expense of supporting a Local Prison : It shall be competent in any Town where there is no Prison, but where there are Police Cells, for one of Her Majesty's Secretaries of State to issue an Order declaring that such Cells or any Number of them, or that any other Premises in the Possession of the Administrators of the Police in such Town, shall be a legal Prison for the Detention of convicted Prisoners for any Period not exceeding Three Days, and such Order shall be issued in the Manner and subject to the Conditions set forth in the Provisions of 'The Prisons (Scotland) Administration Act, 1860,' in reference to Local Prisons, so far as the same are applicable to the Purposes of this Act.

Secretary of State may issue Order as to Police Buildings.

XXXVII. When any Building or Part of a Building other than a Local Prison under the Administration of a County Board is or shall be a lawful Place of Detention for Prisoners under short Sentences, whether under the Powers conferred on the Secretary of State by this Act, or in virtue of any Public Local Act, the Administrators of Police having Charge of the same, and all Persons in their Employment, shall, in respect to such Buildings or Part of a Building, be subject to the Rules for Prisons in *Scotland* as authorized in the said Prisons Administration Act, and to all the Provisions of the said Act relating to the Discipline and Management of Prisons and the Transmission of Returns, as if such Administrators were a County Board.

Provisions as to Discipline, etc. in Prisons to apply to convicted Prisoners in such Premises.

SCHEDULES referred to in this Act.

SCHEDULE (A.)

1. *Complaint for Offence at Common Law.*

UNDER THE SUMMARY PROCEDURE ACT, 1864.

Unto the Honourable Her Majesty's Justices of the Peace for
the County of [or Sheriff of the County
of or Magistrates of the Burgh of
as the Case may be].

The Complaint of A.B., Procurator Fiscal of Court [or other
Party entitled to prosecute with his Concurrence]:

Humbly sheweth,

That J.K. [Designation] has been guilty of the Crime of
Actor, or Art and Part, in so far as [here state the Particulars of the Offence]:

May it therefore please your Honours [or Lordship] to grant
Warrant to apprehend the said J.K., and bring him before
you [or to cite the said J.K. to appear before you] to
answer to this Complaint, and thereafter to convict him of
the said Crime, and to adjudge him to suffer the Pains of
Law.

According to Justice.

A.B. [Signature of Public Prosecutor,
or of Private Prosecutor with
Concurrence annexed.]

2. *Complaint praying for Conviction in Terms of Act, and for Imprisonment or Forfeiture.*

UNDER THE SUMMARY PROCEDURE ACT, 1864.

Unto the Honourable Her Majesty's Justices of the Peace for
the County of [or Sheriff of the County
of or Magistrates of the Burgh of].

The Complaint of A.B., Procurator Fiscal of Court [or other
Party entitled to prosecute]:

Humbly sheweth,

That J.K. [Designation] has contravened the Act [or has been
guilty of an Offence within the Meaning of the Act] [specify the
Act or Acts], in so far as [state Particulars of Contravention or
Offence], whereby the said J.K. is liable [state shortly the Nature of
the Forfeiture or Penalty and the Alternative].

May it therefore please your Honours [or Lordship] to grant
Warrant to apprehend the said J.K., and bring him be-
fore you [or to cite the said J.K. to appear before you] to
answer to this Complaint, and thereafter to convict him of
the aforesaid Contravention, and to adjudge him to suffer
the Penalties provided by the said Act [or Acts, or any of
them].

[Where a Warrant *Ad factum præstandum* is desired, it must be specially prayed for.]

According to Justice.

A.B. [Signature of Complainer.]

SCHEDULE (B.)

Oath of Verity.

At _____ Day of _____ in
Presence of

Compeared A.B., the Complainer, [or a credible Witness, as the Case may be,] who, being solemnly sworn, depones that what is contained in the foregoing Complaint is true, as he shall answer to God.

[Signature of Complainer or Witness.]

[Signature of Judge.]

SCHEDULE (C.)

Warrant for Citation of Respondent.

The Justice [or Sheriff, or Magistrate, or Clerk of Court] grants Warrant to Officers of Court to serve a Copy of the foregoing Complaint and of this Deliverance upon J.K., Respondent, and to cite him to appear personally to answer thereto at [Court House or Place] upon the _____ Day of _____ at _____

_____ o'Clock _____ noon, with Certification, and also to cite Witnesses or Havers for both Parties for all Diets in the Cause.*

[Signature of Judge or Clerk of Court.]

SCHEDULE (D.)

1. *Warrant for Apprehension of Respondent in the First Instance.*

The Justice [or Sheriff or Magistrate] grants Warrant to Officers of Court to search for and apprehend J.K., Respondent, and, if necessary for that Purpose, to open any shut or lockfast Places, and to bring him before any One or more, as may be competent, of Her Majesty's Justices of the Peace for the County of _____

[or the Sheriff of the County of _____ or a Magistrate of the Burgh of _____], to answer to the foregoing Complaint at [Court House or Place], and in the meantime to detain him in a Police Station House or other convenient Place, and also to cite Witnesses and Havers for both Parties for all Diets in the Cause.*

[Signature of Judge.]

2. *Warrant for Apprehension of the Respondent in the Second Instance.*

The Justice [or Sheriff or Magistrate], in respect J.K., Respondent, has failed to appear to answer to the foregoing Complaint after being duly cited to this Diet, grants Warrant to Officers of Court to search for and apprehend the said J.K., and, if necessary for that

Purpose, to open any shut or lockfast Places, and to bring him before any One or more, as may be competent, of Her Majesty's Justices of the Peace for the County of [or the Sheriff of the County of or a Magistrate of the Burgh of], and in the meantime to detain him in a Police Station House or other convenient Place, and also to cite Witnesses and Havers for both Parties for all Diets in the Cause.*

[Signature of Judge.]

- * [A Warrant to search for stolen Goods or other Search Warrant may be prayed for in the Complaint, and included in the Warrant of Citation or Apprehension, if otherwise competent.]

SCHEDULE (E.)

1. Warrant for the Apprehension of a Witness in the First Instance.

The Justice [or Sheriff or Magistrate], in respect it has been made to appear to him upon Oath that *E.F.* [Designation] is likely to give material Evidence for the Prosecution in the foregoing Complaint [if the Complaint is on a separate Paper, describe it by the Names of the Parties and Date of Presentation], and that it is probable that the said *E.F.* will not attend to give Evidence without being compelled so to do, grants Warrant to Officers of Court to search for and apprehend the said *E.F.*, and, if necessary for that Purpose, to open any shut or lockfast Places, and in the meantime to detain him in a Police Station House or other convenient Place, and to bring and have him on the Day of at o'Clock noon before any One or more, as may be competent, of Her Majesty's Justices of the Peace for the County of [or the Sheriff of the County of or a Magistrate of the Burgh of], to bear Witness for the Prosecution in the foresaid Complaint.

[Signature of Judge.]

2. Warrant for the Apprehension of a Witness in the Second Instance.

The Justice [or Sheriff or Magistrate], in respect that *E.F.* [Designation] has failed to appear after having been duly cited to bear Witness for the Prosecution [or for the Respondent] in the foregoing Complaint [if the Complaint is on a separate Paper, describe it by the Names of the Parties and Date of Presentation], and no just Excuse has been offered on his Behalf, grants Warrant to Officers of Court to search for and apprehend the said *E.F.*, and, if necessary for that Purpose, to open any shut or lockfast Places, and in the meantime to detain him in a Police Station House or other convenient Place, and to bring and have him on the Day of at o'Clock noon before any One or more, as may be competent, of Her Majesty's Justices of the Peace for the County of [or the

Sheriff of the County of _____ or a Magistrate of the
 Burgh of _____], to bear Witness for the Pro-
 secution [or for the Respondent] in the foresaid Complaint.
 [Signature of Judge.]

SCHEDULE (F.)

1. Citation of Respondent.

To J.K. [Designation.]

Take Notice that you are required to appear personally at the
 Place and Time specified in the Warrant, of which the foregoing is
 a Copy, to answer to the Complaint to which this Notice is attached,
 with Certification.

This I do on the _____ Day of _____
 [Signature of Officer.]

2. Citation of Witness.

To E.F. [Designation.]

Take Notice that you are required to appear before any One of
 Her Majesty's Justices of the Peace for the County of _____
 [or the Sheriff of the County of _____ or a Magistrate of the
 Burgh of _____] at [Court House or Place] on the
 _____ Day of _____ at the Hour of _____ o'Clock
 noon, and at any adjourned Diet which you may be required to
 attend, to bear Witness for the Prosecution [or for the Respondent]
 in the Complaint at the Instance of A.B. [Designation], against
 J.K. [Designation], under Certification; [and also to bring with you
 and exhibit such of the Documents mentioned in the subjoined Lists
 as may be in your Possession.]

This I do on the _____ Day of _____
 [Signature of Officer.]

SCHEDULE (H.)

1. Interlocutor adjourning the Diet.

The Justice [or Sheriff or Magistrate] adjourns the Diet to the
 _____ Day of _____, and appoints the said J.K. to
 appear personally on that Day at _____ o'Clock _____ noon.
 [Signature of Judge.]

2. Adjournment and Interim Warrant of Imprisonment.

The Justice [or Sheriff or Magistrate] adjourns the Diet to the
 _____ Day of _____, and in the meantime grants Warrant
 to commit the said J.K. to the Prison of _____, therein to
 be detained until that time, or until he find Caution to appear at
 all future Diets of Court under a Penalty of L.

[Signature of Judge.]

SCHEDULE (I.)

*Minute of Procedure at the Hearing.*1. *When the Respondent appears.*

At the Day of in the
 Presence of of Her Majesty's Justices of the
 Peace for the County of [or Sheriff or Magistrate], ap-
 peared J.K. complained against; and the Complaint being read over
 to him, he answers that he is Not Guilty, [or that he is Guilty.]
 [Signature.]

[If the Respondent pleads Not Guilty.]

The Witness [or Witnesses] after named was [or were] examined
 in Support of the Complaint, viz. :—

And the Witness [or Witnesses] after named was [or were] ex-
 amined in Exculpation, viz. :—

[Note also the Production of any Documents produced in Evi-
 dence by either Party.]

2. *When the Respondent is absent.*

At the Day of in Presence
 of of Her Majesty's Justices of the Peace for the County
 of [or Sheriff or Magistrate], J.K. complained against
 having failed to appear, after having been duly summoned.

The Witness [or Witnesses] after named was [or were] examined
 in Support of the Complaint, viz. :—

[Note also any Productions.]

SCHEDULE (K.)

1. *Conviction for Offence at Common Law.*

The Justices [or Justice, or Sheriff, or Magistrate], in respect of
 the Judicial Confession of the said J.K. [or of the Evidence ad-
 duced], find the said J.K. guilty of the Crime charged [or state to
 what Extent he is guilty], and therefore [state the Terms of the
 Sentence].

[Signature of Judges or Judge.]

2. *Conviction for Contravention of Act punishable by Imprisonment.*

The Justices [or Justice, or Sheriff, or Magistrate], in respect of
 the Judicial Confession of the said J.K. [or of the Evidence ad-
 duced], convict the said J.K. of the Contravention [or Offence]
 charged [or state to what Extent he is guilty], and, therefore, adjudge
 him to be imprisoned in the Prison of for the Period
 of from this Date [or from the Date of his Imprison-
 ment]. [If authorized by the Act, add, and find him liable in Pay-
 ment to the Complainer of L. of Expenses, and adjudge
 him to be imprisoned in the said Prison for the further Period of
 Days from the Expiration of the last-mentioned
 Period, unless the said Sum shall be sooner paid], and grant War-

rant to Officers of Court to apprehend him and convey him to the said Prison, and to the Keeper thereof to receive and detain him accordingly.

[Signature of Judges or Judge.]

3. *Conviction for a Penalty, and, in default of Payment, Imprisonment.*

The Justices [or Justice, or Sheriff, or Magistrate], in respect of the Judicial Confession of the said J.K. [or of the Evidence adduced], convict the said J.K. of the Contravention [or Offence] charged [or state to what Extent he is guilty], and, therefore, adjudge him to forfeit and pay the Sum of L. of Penalty [or of modified Penalty, where there is Power to modify], [with the Sum of L. of Expenses, where Expenses may be awarded]; and in default of immediate Payment thereof [or, if Time be allowed, say, within Days from this Date], adjudge him to be imprisoned in the Prison of for the Period of from the Date of his Imprisonment, unless the said Sum [or Sums] shall be sooner paid, and grant Warrant to Officers of Court to apprehend him and convey him to the said Prison, and to the Keeper thereof to receive and detain him accordingly.

[Signature of Judges or Judge.]

4. *Conviction for a Penalty to be recovered by Poinding, and in default of Recovery, Imprisonment.*

The Justices [or Justice, or Sheriff, or Magistrate], in respect of the Judicial Confession of the said J.K. [or of the Evidence adduced], convict the said J.K. of the Contravention [or Offence] charged [or state to what Extent he is guilty], and, therefore, adjudge him to forfeit and pay the Sum of L. of Penalty [or of modified Penalty, where there is Power to modify], [with the Sum of L. of Expenses, where Expenses may be awarded], and* in default of immediate Payment thereof [or, if Time is allowed, say, within Days from this Date], grant Warrant for Recovery of the said Sum or Sums by Poinding of his Goods and Effects, and summary Sale thereof, on the Expiration of not less than Forty-eight Hours after such Poinding, without further Notice or Warrant, and appoint a Return or Execution of such Poinding and Sale to be made within Eight Days from this Date [or, from the Expiration of the Period herein allowed for Payment, where Time is allowed], under Certification of Imprisonment for the Period of in default of Payment or Recovery of the said Sums with the Expenses of Diligence before the Time allowed for such Report.

[Signature of Judges or Judge.]

Report by Officer of Court.

I, X. Y., report, that by virtue of the foregoing Judgment and Warrant, I have made diligent Search for Goods and Effects of the

within mentioned *J.K.*, and that I can find no sufficient Goods and Effects whereon to levy the Sums within mentioned.

Humbly reported this Day of by
[*Signature of Officer.*]

Warrant of Imprisonment.

At the Day of the Justice
[*or Sheriff or Magistrate*], in respect it appears that the Sum [*or Sums*] mentioned in the foregoing Conviction, with the Expenses of Diligence, have not been paid, and that no sufficient Goods and Effects can be found whereon to levy the said Sum [*or Sums*] and Expenses, grants Warrant to Officers of Court to apprehend the said *J.K.*, and convey him to the Prison of , and to the Keeper thereof to receive and detain him for the Period of from the Date of his Imprisonment, unless the said Sum [*or Sums*], with the further Sum of L. for the Expenses of Diligence, shall be sooner paid. [*Signature of Judge.*]

5. Conviction for a Penalty to be recovered by Pounding and Imprisonment.

The Justices [*or Justice, or Sheriff, or Magistrate*], in respect of the Judicial Confession of the said *J.K.* [*or of the Evidence adduced*], convict the said *J.K.* of the Contravention [*or Offence*] charged [*or state to what Extent he is guilty*], and therefore adjudge him to forfeit and pay the Sum of L. of Penalty [*or of modified Penalty, where there is Power to modify*], [with the Sum of L. of Expenses, *where Expenses may be awarded*,] and ordain instant Execution by Pounding and Sale, and Imprisonment for the Period of Days, in default of immediate Payment [*or if Time is allowed, say, within Days from this Date*]; grant Warrant to Officers of Court, in default of Payment of the said Sum [*or Sums*], for immediate Pounding of the Goods and Effects of the said *J.K.*, and summary Sale thereof on the Expiration of not less than Forty-eight Hours after such Pounding; appoint a Return of such Pounding and Sale to be reported within Eight Days from this Date; and in default of Payment grant Warrant to Officers of Court to apprehend the said *J.K.*, and convey him to the Prison of , and to the Keeper thereof to receive and detain him for the Period of Days from the Date of his Imprisonment, unless the said Sum [*or Sums*], together with the Expense of Pounding, if any, shall be sooner paid, or Liberation shall be granted. [*Signature of Judges or Judge.*]

Warrant of Liberation.

The Justice [*or Sheriff or Magistrate*], in respect the Complainer has failed to certify by the Report of an Officer of Court that no sufficient Goods and Effects of the said *J.K.* can be found whereon to levy the Sums specified in the foregoing Conviction within the

Period of Eight Days therein mentioned [or in respect that a sufficient Poinding and Sale of the Effects of the said *J.K.* has been made], grants Warrant to the Keeper of the Prison of for the immediate Liberation of the said *J.K.*

[Signature of Judge.]

6. Judgment for a Penalty recoverable by Diligence.

The Justices [or Justice, or Sheriff, or Magistrate], in respect of the Judicial Confession of the said *J.K.* [or of the Evidence adduced], convict the said *J.K.* of the Contravention [or Offence] charged [or state to what Extent he is guilty], and therefore adjudge him to forfeit and pay the Sum of L. of Penalty [or modified Penalty, where there is Power to modify], of L. , and also find the said *J.K.* liable in L. of Expenses to the Complainer, and* ordain instant Execution by Arrestment, and also Execution by Poinding [and Imprisonment, where there is Power to Imprison]; grant Warrant to Officers of Court to arrest all Debts and Sums of Money owing to the said *J.K.*, and [if Time is allowed, add, in default of Payment within Days from this Date] to poind his Goods and Effects and to sell the same at the Expiration of not less than Forty-eight Hours after such Poinding, without further Notice or Warrant; [where the Act authorizes Imprisonment, add,] and appoint a Return or Execution of such Poinding and Sale to be made within Days from the Expiration of the Period hereby allowed for Payment, under Certification of Imprisonment [if for a Term, specify the Term], in default of Payment or Recovery of the said Sums with the Expenses of Diligence before the Time allowed for such Report.

[Signature of Judges or Judge.]

Warrant of Imprisonment to be granted upon Officer's Report.

The Justice [or Sheriff or Magistrate], in respect it appears that the Sums mentioned in the foregoing Judgment, with the Expenses of Diligence, have not been paid or recovered under the said Judgment in whole or in part, grants Warrant to Officers of Court to apprehend the said *J.K.*, and convey him to the Prison of and to the Keeper thereof to receive and detain him until liberated in due Course of Law [or, if the Imprisonment is for a Term, say, for the Period of Days from the Date of his Imprisonment, unless the said Sums, with L. for the Expenses of Diligence, shall be sooner paid].

[Signature of Judge.]

*[If at the Hearing it shall appear that the issuing of a Warrant of Arrestment, Poinding, and Sale would be inexpedient, then, in place of the Warrant annexed to the Judgment in the preceding Form, say:

And in respect it is inexpedient to issue a Warrant of Poinding and Sale [or of Arrestment, Poinding, and Sale], ordain instant

Execution by Imprisonment, and grant Warrant to Officers of Court to apprehend the said J.K., and convey him to the Prison of _____, and to the Keeper thereof to receive and detain him for the Period of _____ from the Date of his Imprisonment, unless the said Penalty and Expenses shall be sooner paid.]

[*This Form only to be used where the Acts founded on authorize Imprisonment for a specified Period.*]

7. Judgment and Warrant *Ad factum præstandum*, and, in default, Imprisonment.

The Justices [*or Justice, or Sheriff, or Magistrate*], in respect of the Judicial Confession of the said J.K. [*or of the Evidence adduced*], find the Complaint proven [*or state to what Extent it is proven, or state any other Findings that may be considered necessary*], and ordain the said J.K. to [*here state the Matter required to be done*] under Certification that if, upon a Copy of this Judgment being served upon the said J.K. by an Officer of Court, he shall neglect or refuse to obey the same within the Period of _____ after such Service, he shall be imprisoned for the Period of _____ Days : Find the said J.K. liable in L. _____ of Expenses to the Complainer; and failing immediate Payment thereof [*or if Time be allowed, within _____ Days from this Date, say*], grant Warrant for Recovery of the said Sum by Pounding of his Goods and Effects, and summary Sale thereof, etc., [*as in No. 4 of this Schedule.*]
[*Signature of Judges or Judge.*]

Warrant of Imprisonment.

The Justice [*or Sheriff or Magistrate*], in respect it is now proved to his Satisfaction that a Copy of the foregoing Judgment was duly served upon the within-named J.K., upon the _____ Day of _____, and that he has not as yet obeyed the Order therein contained, and that the Period appointed for Implement thereof is now expired, grants Warrant to apprehend the said J.K., and convey him to the Prison of _____, and to the Keeper thereof to receive and detain him for the Period of _____ from the Date of his Imprisonment.

[*Signature of Judge.*]

[*Note.*—A Warrant *Ad factum præstandum* in the above Form may, if required by the Act, be combined with a Conviction or Judgment for a Penalty. Where Judgment is given for the Expenses of obtaining a Warrant *Ad factum præstandum* recoverable by Pounding and Sale, and Imprisonment in default, the Proceedings shall be as nearly as possible in conformity with the Forms above prescribed for the Recovery of Penalties and Expenses. If the Expenses are declared to be recoverable by ordinary Diligence, or by Arrestment and Pounding, the Warrant and Procedure will be as in No. 6.]

8. *Judgment of Absolvitor or Dismissal.*

The Justices [or Justice, or Sheriff, or Magistrate] assoilzie the within-designed *J.K.* from the foregoing Complaint [or dismiss the Complaint]. [If an Award of Expenses be competent, add,] Find the within-designed *A.B.*, Complainer, liable to the said *J.K.* in the Sum of L. of Expenses, and decern and ordain instant Execution therefor by Arrestment, and also Execution by Pounding and Sale and Imprisonment, if the same be competent, after a Charge of Fifteen free Days; grant Warrant, etc., [as in No. 6, omitting Warrant of Imprisonment when incompetent.]

[Signature of Judges or Judge.]

9. *Extract of Judgment convicting, absolving, or dismissing [as the Case may be].*

At the Day of , in Presence of . In the Complaint at the Instance of *A.B.* against *C.D.*, charging him with [name the Crime, Offence, or Contravention], as particularly set forth in said Complaint, the Justices [or Justice, or Sheriff, or Magistrate], in respect of [state the Terms of the Judgment, and of any subsequent Warrant upon which Execution is to proceed]. Extracted by me, Clerk of Court.

[Signature of Clerk.]

Execution may proceed either upon the Judgment and Warrant itself, or upon an Extract in the above Form.

CAP. LVI.

An Act for granting to Her Majesty certain Stamp Duties; and to amend the Laws relating to the Inland Revenue.—
[25th July 1864.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. Whereas an Act was passed in the Nineteenth Year of King George the Second, Chapter Thirty-seven, intituled *An Act to regulate Insurance on Ships belonging to the Subjects of Great Britain, and on Merchandises or Effects laden thereon*; and by Section Four of the same Act it is prohibited to make Re-assurance except in the Cases therein mentioned: And whereas it is expedient to remove such Restriction: Be it enacted, That notwithstanding anything contained in the said Act, it shall be lawful to make Re-assurance upon any Ship or Vessel, or upon any Goods, Merchandise or other Property on board of any Ship or

19 G. 2. c.
37.

Re-assurances of
Sea Risks
may lawfully be
made.

On Termination of Risk and Proof of prior Assurance duly stamped, Allowance to be made for Stamp Duty on Policy of Re-assurance.

Vessel, or upon the Freight of any Ship or Vessel, or upon any other Interest in or relating to any Ship or Vessel which may lawfully be insured, and such Re-assurances shall be deemed to be the Insurance of Interests which may lawfully be insured within the Meaning of the Acts imposing Stamp Duties on Policies of Sea Insurance : Provided always, that if within Three Calendar Months next after the Termination of the Risk on any Policy of Re-assurance Application shall be made to the Commissioners of Inland Revenue, and it shall be proved to their Satisfaction that any such Re-assurance as aforesaid has been made on the same Property or Interest and Risk which shall have been previously assured to the same or some greater Amount by One or more lawful and valid Policy or Policies existing at the Time of making such Re-assurance, and duly stamped for denoting the full and proper Duties chargeable thereon, it shall be lawful for the said Commissioners to make Allowance for the Stamp Duty impressed on the Policy of Re-assurance in like Manner as in the Case of spoiled Stamps on Policies of Insurance under the Act passed in the Fifty-fourth Year of the Reign of King *George* the Third, Chapter One hundred and thirty-three ; and the several Provisions of the said Act, so far as they are applicable or can be applied, shall be observed and put in force with respect to the Allowance of the Stamps on the said Policies of Re-assurance.

Bills of Exchange payable on Demand and endorsed abroad to be deemed Foreign Bills.

II. Any Bill of Exchange payable on Demand, which shall be endorsed out of the United Kingdom, or purport to be so endorsed, wheresoever the same may have been drawn, shall, for the Purpose of charging the Stamp Duty thereon, be deemed to be a Foreign Bill of Exchange, but shall be chargeable with the same Amount of Stamp Duty as an Inland Bill of Exchange for the Payment of Money otherwise than on Demand, according to the Amount thereby made Payable ; and the Provisions, Regulations, and Penalties contained in the Fifth Section of the Act passed in the Seventeenth and Eighteenth Years of Her Majesty's Reign, Chapter Eighty-three, shall be deemed to apply to any such Bill so endorsed or purporting to be endorsed as aforesaid as if the same were a Bill drawn out of the United Kingdom.

Stamp Duties on Letters of Attorney for the Receipt of Dividends or Interest of Stocks, Funds, &c.

III. In lieu of the Stamp Duties now payable for or upon any Letter or Power of Attorney for the Receipt of Dividends or Interest of any of the Government or Parliamentary Stocks or Funds, or of the Stocks or Funds of the Secretary of State in Council of *India*, or of *India* Promissory Notes, or registered Promissory Notes, the Interest of which is payable by Bills of Exchange on the

Governments of *India*, *Madrass*, and *Bombay* respectively, or of the Stocks, Funds, or Shares of or in any Joint Stock Company or other Company or Society whose Stocks or Funds are divided into Shares and transferable, there shall be charged and paid for or upon such Letter or Power of Attorney as aforesaid the following Stamp Duties; (that is to say,)

Where such Letter or Power of Attorney shall be for the Receipt of One Payment only, the Duty of One Shilling:

And where the same shall be for continuous Receipt or for the Receipt of more than one Payment, the Duty of Five Shillings.

IV. And whereas certain *ad valorem* Stamp Duties are by several Statutes in that Behalf granted and imposed upon or in respect of the following Instruments; (that is to say,)

Probate of a Will and Letters of Administration, with or without a Will annexed, to be granted in *England* or *Ireland*;

Inventory to be exhibited and recorded in any Commissary Court in *Scotland* of the Estate and Effects of any Person deceased:

Stamp Duties on Probates, Letters of Administration, and Inventories to extend to British Ships at Sea.

Be it enacted, That the said Stamp Duties shall be charged and paid in respect of the Value of any Ship or any Share of a Ship belonging to any deceased Person which shall be registered at any Port in the United Kingdom, notwithstanding such Ship at the Time of the Death of the Testator or Intestate may have been at Sea or elsewhere out of the United Kingdom; and for the Purpose of charging the said Duties, such Ship shall be deemed to have been at the Time aforesaid in the Port at which she may be registered.

V. No Stamp Duty shall be chargeable on any such Probate, Letters of Administration, or Inventory as aforesaid in any Case where the whole Estate and Effects of the deceased Person dying after the passing of this Act (exclusive of what he shall have been possessed of or entitled to as a Trustee for any other Person or Persons, and not beneficially), shall be sworn not to exceed and shall not actually exceed in Value the Sum of One hundred Pounds.

Probates, etc., exempted from Stamp Duty where the Effects do not exceed L.100.

[§ VI. Applies to Licences of Appraisers, Pawnbrokers, Dealers in Plate and Patent Medicines, Hawkers and Pedlars, House Agents, and Sellers of Playing Cards.]

[§§ VII.-XIV. Relate to Licences of Hawkers, Brewers, Tobacconists, and Auctioneers.]

XV. It shall be lawful for the Lords Commissioners of Her Majesty's Treasury, if they shall see fit, and under such Regulations, Conditions, and Limitations as they shall

Postage Stamps may be received in

Payment of
Taxes in
Scotland
and Ire-
land.

think proper, to authorize and direct the Commissioners of Inland Revenue and their Officers to receive Postage Stamps as and for Payment of the respective Taxes of Land Tax and Assessed Taxes and Income Tax, or any of them, which may become due or payable in *Scotland* or *Ireland*; and, under such Regulations as aforesaid, such Postage Stamps shall be delivered over to the Postmaster General or his Officers, and the Amount or Value thereof be paid out of the Revenue of the Post Office to the Inland Revenue, and accounted for as Monies arising from the said Taxes.

Persons
admitted
Barristers
in England
or in Ire-
land may
be admitted
in the other
Part of the
United
Kingdom
on Pay-
ment of the
Stamp
Duty of
L.10 only.

XVI. Whereas the Stamp Duty chargeable on the Admission of any Person to the Degree of Barrister-at-Law in either of the Inns of Court in *England* is Fifty Pounds, and the Stamp Duty chargeable on the Admission of any Person to the like Degree in the Inns of Court in *Ireland* is also Fifty Pounds, but of the latter Sum Ten Pounds is payable to the Treasurer of the Society of *King's Inns*, to be applied as the Society may direct: Be it enacted, That where any Person duly admitted to the said Degree in *Ireland*, and having paid the full Stamp Duty chargeable thereon, shall be admitted as aforesaid in *England*, his latter Admission shall be chargeable with the Stamp Duty of Ten Pounds only for the Use of Her Majesty's Revenue; and where any Person duly admitted to the said Degree in *England*, and having paid the full Stamp Duty chargeable thereon, shall be admitted as aforesaid in *Ireland*, his latter Admission shall be chargeable with the Stamp Duty of Ten Pounds only for the Use of the said Society of *King's Inns*, to be paid over to the Treasurer of the said Society, and applied as directed or authorized by the Statutes in that Behalf.

Parts of
certain
Stamp
Duties to
be paid di-
rect to the
Treasurer
of King's
Inns,
Ireland,
instead of
into the
Exchequer
as hereto-
fore.

XVII. Whereas by an Act passed in the Fifth and Sixth Years of the Reign of Her present Majesty, Chapter Eighty-two, and the several Acts continuing and confirming the same, the Receiver General of Stamp Duties is required to pay Parts of certain Stamp Duties in the said first-recited Act mentioned at the Receipt of Her Majesty's Exchequer in *Ireland*, and the Commissioners of Her Majesty's Treasury for the Time being are directed to pay the same to the Treasurer of the Society of *King's Inns*: Be it enacted, That the said Receiver General shall pay the same to the said Treasurer instead of to the Receipt of Her Majesty's Exchequer in *Ireland* as directed by the said Acts, to be applied as in the said Acts mentioned.

Provisions
of former
Acts to

XVIII. All the Powers, Provisions, Clauses, Regulations, Forfeitures, Pains, and Penalties contained in or imposed by any Act or Acts relating to any Duties of the

same Kind or Description as the several Rates or Duties granted by this Act respectively, and in force at the Time of the passing of this Act, and not hereby expressly repealed, shall respectively be in full Force and Effect with respect to the said Rates and Duties by this Act granted respectively, so far as the same are or shall be applicable, in all Cases not hereby expressly provided for, and shall be observed, applied, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said last-mentioned Rates and Duties, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express Provisions of this Act, as fully and effectually to all Intents and Purposes as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the Rates and Duties by this Act granted respectively.

apply to
this Act.

XIX. When any Person liable to the Payment of any of the Duties of Land Tax, Assessed Taxes, or Income Tax in *Scotland* shall have received the accustomed Notice thereof, it shall be lawful for him, within Twenty-one Days after receiving such Notice, to produce the same at any Money Order Office of the General Post Office in *Scotland*, and pay to the Postmaster there the Sum payable according to such Notice, and thereupon the said Postmaster shall deliver to him a Post Office Order payable at the General Post Office in *London* to the Receiver General of Inland Revenue for the said Sum, less the Commission for such Order, which Order such Person shall forthwith transmit to the Collector at the Office for Receipt in a Letter prepaid by being duly stamped with the proper Postage Stamp or Stamps, specifying the Particulars of the Payment in such Form as shall be provided by the Commissioners of Inland Revenue for that Purpose, and delivered to the said Person along with the said Order; and upon the Receipt of the said Order and Letter, with the Particulars and in the Form aforesaid, the Collector shall credit the Person named in the said Letter with the Amount specified in the said Order, and with the said Commission, in like Manner as if the same had been paid to the Collector in Cash.

Taxes in
Scotland
may be
paid by
means of
Post Office
Orders.

CAP. LXXV.

An Act to amend the Law relating to certain Nuisances on Turnpike Roads, and to continue certain Turnpike Acts in Great Britain.—[29th July 1864.]

Extension
of Provi-
sions of 5 &
6 W. 4. c.
50, as to
Steam-
engines to
Turnpike
Roads.

§ I. Whereas by the General Act for the Regulation of Highways, passed in the Session of the Fifth and Sixth years of the Reign of King *William* the Fourth, Chapter Fifty, Section Seventy, it is, amongst other things, provided that it shall not be lawful for any Person to erect or cause to be erected any Steam Engine, Gin, or other like Machine, or any Machinery attached thereto, within the Distance of Twenty-five Yards from any Part of any Carriageway or Cartway, unless such Steam Engine, Gin, or other like Engine or Machinery be within some House or other Building, or behind some Wall or Fence, sufficient to conceal or screen the same from the said Carriageway or Cartway, so that the same may not be dangerous to Passengers, Horses, or Cattle, and a continuing Penalty of Five Pounds a Day is imposed for any Contravention of the said Provision: And whereas it is expedient that a like Provision should be made with respect to Turnpike Roads: Be it enacted, That it shall not be lawful for any Person to erect or cause to be erected, or to use, any Steam Engine, Gin, or other like Machine, within the Distance of Twenty-five Yards from any Part of any Turnpike Road, unless such Steam Engine, Gin, or other like Engine shall be within some House or other Building, or behind some Wall, Fence, or Screen sufficient to conceal or screen the same from the said Road, so that the same may not be dangerous to Passengers, Horses, or Cattle; and in Case any Person shall offend in any of the Cases aforesaid every such Person so offending shall forfeit and pay any Sum not exceeding Five Pounds for every Day during any Part of which such Steam Engine, Gin, or Engine shall be permitted to continue, contrary to the Provisions of this Act; which said Penalties shall be levied, recovered, and applied in such and the same Manner as any Penalty or Forfeiture for any other Offence on any Turnpike Road may be levied, recovered, and applied; but no Penalty shall be incurred under this Section in respect of any Locomotive Engine travelling according to Law on any public Railway, Turnpike Road, or other Highway.

CAP. XC.

An Act to amend, an Act of the present Session, Chapter Eighteen, as to the Stamp Duties on certain Letters or Powers of Attorney.—[29th July 1864.]

WHEREAS by an Act passed in the present Session of Parliament, Chapter Eighteen, certain Stamp Duties are granted and imposed for and upon any Letter or Power of Attorney for the Sale, Transfer, or Acceptance of any of the Government or Parliamentary Stocks or Funds, and also for and upon any Letter or Power of Attorney for the Receipt of Dividends of any such Stocks or Funds; and Doubts have arisen whether both the said Duties may not be chargeable upon one and the same Instrument: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

27 & 28
Vict. c. 18.

I. No Letter or Power of Attorney made for the Sale, Transfer, or Acceptance of any of the Government or Parliamentary Stocks or Funds, and duly stamped in that Behalf, shall be chargeable with any further or other Stamp Duty by reason of its containing therein any Authority for the Receipt of Dividends on any such Stocks or Funds.

Letters of Attorney for the Sale, etc. of Government Stock how to be charged with Stamp Duty.

II. And whereas Doubts have arisen as to whether certain Letters or Writings herein-after described are chargeable with Stamp Duty as Letters or Powers of Attorney: Be it enacted, That no Letter or other Writing under Hand only containing any Request or Direction to any Joint Stock or other Company or Society, or to any Secretary, Treasurer, or other Officer thereof, or to any Banker, by the Owner or Proprietor of any Stocks, Funds, or Shares of or in any such Company or Society, to pay the Dividends or Interest arising from any such Stocks, Funds, or Shares to any Person named in such Order, Request, or Direction, shall be chargeable with Stamp Duty as a Letter or Power of Attorney.

As to Letters requesting that Dividends or Interest of Stocks, etc. may be paid to Nominees.

CAP. XCIV.

An Act to remove Disabilities affecting the Bishops and Clergy of the Protestant Episcopal Church in Scotland.—[29th July 1864.]

WHEREAS an Act was passed in the Thirty-second Year

52 G. 3.
c. 68.

3 & 4 Vict.
c. 38.

59 G. 3.
c. 60.

of the Reign of His Majesty King *George* the Third, intituled *An Act for granting Relief to Pastors, Ministers, and Lay Persons of the Episcopal Communion in Scotland*: And whereas by the Ninth Section of the said Act it is provided and declared that ‘no Person exercising the Function or assuming the Office and Character of a Pastor or Minister of any Order in the Episcopal Communion in *Scotland* as aforesaid shall be capable of taking any Benefice, Curacy, or other Spiritual Promotion within that Part of *Great Britain* called *England*, the Dominion of *Wales*, or the Town of *Berwick-upon-Tweed*, or of officiating in any Church or Chapel within the same, where the Liturgy of the Church of *England* as now by Law established is used, unless he shall have been lawfully ordained by some Bishop of the Church of *England* or of *Ireland*:’ And whereas an Act was passed in the Third and Fourth Years of the Reign of Her present Majesty Queen *Victoria*, intituled *An Act to make certain Provisions and Regulations in respect to the Exercise within England and Ireland of their Office by the Bishops and Clergy of the Protestant Episcopal Church in Scotland; and also to extend such Provisions and Regulations to the Bishops and Clergy of the Protestant Episcopal Church in the United States of America; and also to make further Regulations in respect to Bishops and Clergy other than those of the United Church of England and Ireland*, by which Act the Provisions in the said Ninth Section of the said first-recited Act were altered, extended, and amended: And whereas it is expedient that the Disabilities affecting the Bishops and Clergy of the said Protestant Episcopal Church in *Scotland* imposed by the said recited Acts should be removed, and for that purpose that the said recited Acts should be in part repealed: And whereas by an Act passed in the Fifty-ninth Year of the Reign of His said late Majesty King *George* the Third, intituled *An Act to permit the Archbishops of Canterbury and York and the Bishop of London for the Time being to admit Persons into Holy Orders specially for the Colonies*, it is enacted that ‘no Person who shall have been admitted into Holy Orders by the Bishops of *Quebec*, *Nova Scotia*, or *Calcutta*, or by any other Bishop or Archbishop than those of *England* or *Ireland*, shall be capable of officiating in any Church or Chapel of *England* or *Ireland*, without special Permission from the Archbishop of the Province in which he proposes to officiate, or of having, holding, or enjoying, or of being admitted to, any Parsonage or other Ecclesiastical Preferment in *England* or *Ireland*, or of acting as Curate therein, without the Consent and Approbation of the Archbishop of the Province and also of the Bishop of the

Diocese in which any such Parsonage or Ecclesiastical Preferment or Curacy may be situated :’ And whereas Doubts may arise after the passing of this Act whether the Provisions of the said last-recited Act would apply to Persons admitted into Holy Orders by Bishops of the Protestant Episcopal Church in *Scotland*, and it is expedient that such Doubts should be removed : Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. The said Ninth Section of the said first-recited Act is hereby repealed.

II. The words ‘ Protestant Episcopal Church in *Scotland*’ shall, for the purposes of this Act, mean the Episcopal Communion in *Scotland* as mentioned in the said first-recited Act.

III. The said second-recited Act, so far only as it relates to the Protestant Episcopal Church in *Scotland*, or the Bishops and Clergy thereof, is hereby repealed.

IV. The Provisions and Enactments of the said last-recited Act shall not be or be held to be applicable to any Person admitted into Holy Orders by a Bishop of the Protestant Episcopal Church in *Scotland*.

V. No Person admitted into Holy Orders by any Bishop of the Protestant Episcopal Church in *Scotland* shall be entitled to be admitted or instituted to any Benefice or other Ecclesiastical Preferment in *England* or *Ireland*, without the Consent and Approbation of the Bishop of the Diocese in which such Benefice or other Ecclesiastical Preferment may be situated ; and any such Bishop shall be entitled to refuse such Consent and Approbation without assigning Reason for such Refusal, any Law or Practice to the contrary notwithstanding ; and every such Person seeking to be admitted or instituted to such Benefice or other Ecclesiastical Preferment, or to be licensed to any Curacy, shall, before being admitted, instituted, or licensed, make and subscribe before such Bishop every such Declaration and Subscription as he would by Law have been required to make and subscribe at his Ordination if he had been ordained by a Bishop of the United Church of *England* or *Ireland* : Provided always, that the Provisions of this Section shall not apply to any such Person who shall hold or shall have held any Benefice or Ecclesiastical Preferment in *England* or *Ireland*.

VI. Any Person admitted into Holy Orders by any Bishop of the Protestant Episcopal Church in *Scotland*, and who does not hold or who has not held any Benefice or Eccle-

Sec. 9 of
32 G. 3.

c. 68, re-
pealed.

Definition
of ‘ Pro-
testant
Episcopal
Church in
Scotland.’

8 & 4 Vict.
c. 38, in
part re-
pealed.

As to appli-
cation of
Provisions
of 59 G. 3.
c. 60.

Persons ad-
mitted into
Holy Or-
ders by
Bishops in
Scotland
not to be
admitted to
Benefices,
etc. in *Eng-
land* or *Ire-
land* with-
out Consent
of Bishop
of the Dio-
cese.

Penalty on
such Per-
sons offi-
ciating in

certain
Cases with-
out Con-
sent of
Bishop.

siastical Preferment in *England* or *Ireland*, who shall knowingly officiate on more than One Day within Three Months in any Church or Chapel in any Diocese in *England* or *Ireland*, without notifying the same to the Bishop of the Diocese in which such Church or Chapel is situate, or who shall officiate contrary to any Injunction of the Bishop of the Diocese under his Hand and Seal, shall for every such Offence forfeit and pay the Sum of Ten Pounds to the Governor of Queen *Anne's* Bounty, to be recovered by Action of Debt, brought in the Name of the Treasurer of the said Bounty, in any of Her Majesty's Courts of Record at *Westminster*, or in the Court of Session in *Scotland* at the Suit of the Public Prosecutor, or in *Ireland* in any Court of Common Law in the Name of the Ecclesiastical Commissioners.

CAP. XCVI.

An Act to enable certain Royal and Parliamentary Burghs in Scotland to avail themselves of the Provisions of the Acts Twenty-second and Twenty-third Victoria, Chapter Sixty-six, and Twenty-third and Twenty-fourth Victoria, Chapter One hundred and forty-six, for regulating the Sale of Gas.—[29th July 1864.]

22 & 23
Vict. c. 66.

WHEREAS by an Act passed in the Twenty-second and Twenty-third Years of the Reign of Her present Majesty, intituled *An Act for regulating Measures used in Sales of Gas*, Royal Burghs in *Scotland* not being County Towns were enabled to avail themselves of the Provisions of the said Act, and it was compulsory on Counties and Royal Burghs being County Towns to bring the said Act into operation: And whereas by another Act passed in the Twenty-third and Twenty-fourth Years of Her present Majesty, intituled *An Act to amend the Act for regulating Measures used in Sales of Gas*, it was rendered optional in Counties to avail themselves of the Provisions of the said first-mentioned Act: And whereas the Limits of certain Royal Burghs forming Portions of Parliamentary Burghs are not co-extensive with the Parliamentary Boundaries, and in consequence thereof the Provisions of the said first-mentioned Act, if adopted by these Royal Burghs, would not apply to the whole District within the Parliamentary Boundaries; and it is expedient that Powers should be conferred to render the Provisions of the said Acts applicable within the said Parliamentary Boundaries: Therefore

23 & 24
Vict. c. 146.

be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. The Magistrates of any Royal Burgh whose ordinary Jurisdiction has been extended beyond the Bounds thereof by Act or Acts of Parliament, or of any Parliamentary Burgh having a Population of Twenty thousand, in which Burgh the said Acts have not been brought into operation, may, at any Meeting to be called for the Purpose, resolve that the Provisions of the said recited Acts shall be applicable to the whole District subject to their Jurisdiction on and after a certain Date to be fixed by them, and on the said Resolution being come to the Magistrates shall publish the same and make Proclamation thereof at least Three Months before the said Date so fixed, and thereafter the said recited Acts shall apply to and may be enforced by the said Magistrates within the whole District subject to the Jurisdiction of the said Magistrates: Provided always, that where in the first-recited Act anything is required to be done within a specified Time after the passing thereof, such Time shall for the Purposes of this Act be calculated from the Date fixed in the said Resolution for the Provisions of the said recited Acts coming into operation with respect to such District.

Magistrates of certain Burghs may apply to their District Provisions of recited Acts.

CAP. XCVIII.

An Act for extending the Provisions of the 'The Bleaching and Dyeing Works Act, 1860.'—[29th July 1864.]

WHEREAS by the Act of the Session of the Twenty-third and Twenty-fourth Years of the Reign of Her present Majesty, Chapter Seventy-eight, and herein-after referred to as 'The Bleaching and Dyeing Works Act, 1860,' the Employment of Women, Young Persons, and Children in the Process of finishing any Yarn or Cloth of Cotton, Wool, Silk, or Flax, or any of them, or any Mixture of them, or any Yarn or Cloth of any other Material or Materials, is placed under the Regulations of the Acts therein recited, and generally known and herein-after referred to as the Factory Acts, in Cases where the said Process is carried on in Bleaching and Dyeing Works in which Steam, Water, or other mechanical Power is used: And whereas by the Act of the Session of the Twenty-sixth and Twenty-seventh Years of the same Reign,

23 & 24
Vict. c. 78.

Chapter Thirty-eight, the Provisions of the said Bleaching and Dyeing Works Act, 1860, are extended to the Employment of Women, Young Persons, and Children in Calendering and Finishing Works in which Steam, Water, or other mechanical Power is used: And whereas the Process of Finishing is carried on in other Works besides those specified in the said Acts, and as so carried on is attended with the same Evils to the Health of the Women, Young Persons, and Children employed as in the above-mentioned Works: And whereas it is expedient that the Process of Finishing, wheresoever carried on, should be regulated in the same Manner as it is regulated in the above-mentioned Works, and that the Provisions of the Factory Acts should also be extended to the Employment of Women, Young Persons, and Children in the Processes of Hooking or Lapping, or Making-up and Packing: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Extension
of Bleach-
ing and
Dyeing
Works Act.

I. After the passing of this Act, all such Provisions of the said Bleaching and Dyeing Works Act, 1860, as are now in force, shall apply to Women, Young Persons, and Children employed for Hire in any Building or Premises whatever in the Processes of Finishing, Hooking, or Lapping, or of Making-up and Packing, any Yarn or Cloth of Cotton, Wool, Silk, or Flax, or any of them, or any Mixture of them, or any Yarn or Cloth of any other Material or Materials, or any of such Processes; and in the Construction of the said Bleaching Act of 1860, and the Acts therein recited, 'Bleaching Works' and 'Dyeing Works' and 'Factory' shall include any Buildings or Premises in which the said Processes or any of them are carried on: Provided always, that this Act shall not apply to any Building or Premises in which all the Persons employed are Males over the Age of Fourteen Years; provided also, that in Buildings and Premises within this Act the Owner or Owners may from Time to Time, by Notice to be given in Writing to the Inspector, elect what shall be the Working Hours in such Buildings and Premises, so as that the total Number of Hours during which Females, Young Persons, and Children may be lawfully employed in any one Day or Week, according to the Provisions of the said recited Act, be not exceeded, and so as the Working Hours elected be between Six in the Morning and Six in the Evening, or Seven in the Morning and Seven in the Evening, or Eight in the Morning and Eight in the Evening.

II. This Act may be cited for all Purposes as the *Short Title*,
 ‘Bleaching and Dyeing Works Act Extension Act, 1864.’

CAP. CVI.

An Act to authorize the Lords Commissioners of the Treasury to make Provision in regard to the Salaries of certain Sheriffs Substitute in Scotland.—[29th July 1864.]

WHEREAS by an Act passed in the Sixteenth and Seventeenth Years of the Reign of Her Majesty, Chapter Eighty, it was provided that it should be lawful to grant to any salaried Sheriff Substitute then in Office, or his Successor, or to any Sheriff Substitute thereafter to be appointed under the said Act, such Salary as to the Commissioners of Her Majesty's Treasury might seem meet, the same not in any Case exceeding One thousand Pounds by the Year and not less than Five hundred Pounds by the Year: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

16 & 17
 Vict. c. 80.

I. It shall be lawful for the Lords Commissioners of Her Majesty's Treasury, if they shall think fit, to increase the Salaries of Two of the Sheriffs Substitute acting in the County of *Midlothian*, and Two of the Sheriffs Substitute acting in the County of *Lanark*, to any Amount not exceeding Fourteen hundred Pounds by the Year, anything in the said Act notwithstanding.

Provision
 for Salaries
 of Sheriffs
 Substitute
 in Counties
 of Mid-
 lothian and
 Lanark.

II. That it shall be lawful for the Lords Commissioners of Her Majesty's Treasury to provide for the Salary of the Sheriff in Chancery in *Scotland* in like Manner as they are empowered to make Provision for the Salaries of the other Sheriffs in *Scotland*, anything in any Act of Parliament notwithstanding.

Provision
 for Salary
 of Sheriff
 in Chan-
 cery.

CAP. CX.

An Act for the Amendment of the Law relating to the Mitigation of Penalties.—[29th July 1864.]

WHEREAS by various Public Acts of Parliament Penalties are imposed in respect of certain Offences, and it is provided that such Penalties are not to be reduced below the

Limits in such Acts specified : And whereas the Provisions of the said Public Acts are contravened by special Enactments introduced into certain Local Acts, empowering the Justices or Court having Cognizance of Offences in certain Localities to mitigate all Penalties in respect of such Offences : And whereas it is expedient to prevent such Contravention as aforesaid of the general Law : Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Justices
prohibited
from miti-
gating
Penalties
under
general
Powers of
Local Act.

I. Where any Public Act of Parliament provides that in respect of any Offence therein mentioned a Penalty is to be imposed of not less than a particular Sum of Money, or of not less than a certain Term of Imprisonment or other Punishment therein specified, it shall not be lawful for the Justices or Court having cognizance of such Offence to mitigate such Penalty below the Limit specified in that Act of Parliament, in pursuance of any Power of mitigating Penalties conferred on such Justices or Court by any Local or Private Act of Parliament.

Short Title.

II. This Act may be cited for all Purposes as 'The Limited Penalties Act, 1864.'

CAP. CXIV.

The Improvement of Land Act, 1864.—[29th July 1864.]

12 & 13
Vict. c. 100.

WHEREAS an Act was passed in the Twelfth and Thirteenth Years of Her present Majesty, intituled *An Act to promote the Advance of private Money for Drainage of Lands in Great Britain and Ireland*, and several Companies have been incorporated by Act of Parliament, with special Powers for promoting the Improvement of Land in *Great Britain and Ireland* by Drainage and otherwise ; and it is desirable to amend and consolidate the Law relating to the Improvement of Land by Owners of limited Interests, and to enable such Owners to charge their Lands with Money subscribed for the Construction of Railways and navigable Canals which will permanently increase the Value of such Lands : Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

I. The Act first above mentioned, being 'The Private Money Drainage Act, 1849,' is hereby repealed, except so far as relates to any Proceedings on Applications pending under the said Act at the Date of the passing hereof, being the Intention hereof that all such Proceedings shall be worked out under the said Act, and that all Charges to be made in consequence of any such Proceedings shall be made and operate under the said Act, which shall apply thereto as if this Act had never been passed: Provided also, that nothing herein contained shall affect any Charge made under the said Act before the passing hereof, or any Right or Obligation existing or which may arise in respect of any such Charge.

Revised
Act 12 & 13
Vict. c. 100,
repealed.

And with regard to the Commissioners for the Execution of this Act, and other general Matters, be it enacted as follows:

Commis-
sioners,
Land-
owners,
etc.

II. By 'the Commissioners' shall herein be meant, as regards Lands in *Great Britain*, the Inclosure Commissioners for *England* and *Wales*, and as regards Lands in *Ireland*, the Commissioners of Public Works in *Ireland* under an Act of the First and Second Years of His late Majesty King *William* the Fourth, intituled *An Act for the Extension and Promotion of Public Works in Ireland*, and an Act of the Fifth and Sixth Years of the Reign of Her present Majesty, intituled *An Act to promote Drainage of Lands, and Improvement of Navigation and Water Power in connection with Drainage, in Ireland*, and the several Acts amending the same respectively.

Interpreta-
tion of 'the
Commis-
sioners.'

1 & 2 W. 4.
c. 83.

5 & 6 Vict.
c. 89.

III. All the Provisions of the Act of the Ninth and Tenth Years of the Reign of Her present Majesty, intituled *An Act to authorize the Advance of Public Money to a limited Amount to promote the Improvement of Land in Great Britain and Ireland by Works of Drainage*, and of any and every other Act for the Time being in force relating to any of the aforesaid Commissioners, so far as the same may concern or be auxiliary to the Proceedings or Inquiries of the Commissioners under the Authority of such Acts or any of them, or the Authentication of Instruments, shall, except as in this Act otherwise provided, extend and be applicable to their Proceedings and Inquiries, and the Authentication of Instruments, under this Act.

Provisions
of 9 & 10
Vict. c. 101,
etc., to ex-
tend and be
applicable
to Proceed-
ings of
Commis-
sioners.

IV. Every Assistant Commissioner or Inspector acting in any Matter, Inquiry, or Proceeding by the Authority and in the Execution of this Act may receive Declarations and Statements, and examine upon Declaration all such Persons as may voluntarily attend before him in such Matter, Inquiry, or Proceeding.

Assistant
Commis-
sioners
may take
Declara-
tions and
examine
Witnesses

Punish-
ment of
Persons
giving false
Evidence.

V. If any Person shall wilfully give false Evidence in any Matter, Inquiry, or Proceeding under the Provisions of this Act, or shall make or subscribe a false Statement or Declaration for the Purposes of this Act, such Person shall, in *England* or *Ireland*, be deemed guilty of a Misdemeanor, and in *Scotland* of a Crime and Offence, and shall be punished accordingly.

As to
Service of
Notices on
Commis-
sioners.

VI. Any Notice requiring to be served upon the Commissioners may be served by the same being left at or transmitted through the Post, directed to their Office in *London*.

As to the
Services of
Notices
on other
Persons.

VII. In all Cases in which it shall be necessary under the Provisions of this Act to serve any Notice upon any other Person, it shall be sufficient to send such Notice in a registered Post Letter, directed to such Person at his then or last known Place of Residence or of business, unless the Letter containing such Notice shall be returned from the Post Office as undelivered; and if such Person shall not have any Place of Residence or of Business within *Great Britain* or *Ireland*, or if the Place of Business or of Residence of such Person cannot with due Diligence be ascertained, then such Notice may be served upon such other Person as his Representative, or be given in such other Manner as the Commissioners shall in such Case direct or approve.

Interpreta-
tion of
'Land-
owner.'

VIII. The Word 'Landowner' shall mean herein, as to Lands in *England*, the Person who shall be in the actual Possession or Receipt of the Rents or Profits of any Land, whether of Freehold, Copyhold, Customary, or other Tenure, except where such Person shall be a Tenant for Life or Lives holding under a Lease for Life or Lives not renewable, or shall be a Tenant for Years holding under a Lease or an Agreement for a Lease for a Term of Years not renewable, whereof less than Twenty-five Years shall be unexpired at the Time of making any Application to the Commissioners, without regard to the real Amount of the Interest of any Person so excepted; and in the Case where the Person in the actual Possession or Receipt of the Rents or Profits of any Land shall fall within the above Exceptions, then the Person who for the Time being shall be in the actual Receipt of the Rent payable by the Person so excepted, unless he shall also fall within the above Exceptions, shall, jointly with the Person who shall be liable to the Payment thereof, be deemed for the Purposes of this Act to be the Owner of such Lands; and as to Lands in *Scotland*, the Word 'Landowner' shall denote and include every Fiar, Liferenter, or Heir of Entail who shall be in the actual Possession of the Land, or in receipt of the Rents payable on the Tacks, Leases, or Tenancies of the Tenants in the actual Possession thereof; and as to Lands

in *Ireland*, the Word 'Landowner' shall mean such Person as under the Act passed in the First and Second Years of the Reign of Her present Majesty, intituled *An Act to abolish Compositions for Tithes in Ireland, and to substitute Rentcharges in lieu thereof*, shall have the first Estate of Inheritance, or other Estate or Interest equivalent to a perpetual Estate or Interest therein, and also any Tenant in Dower or by the Curtesy, or any Person having under the Limitations of any Settlement by Deed, Will, Act of Parliament, or otherwise any Estate for Life, or other particular Estate thereby created or limited out of or in any Estate of Inheritance, or by, out of, or in any such Estate or Interest as by or under the last-mentioned Act is to be deemed equivalent to a perpetual Estate or Interest; and as to Lands in any part of the United Kingdom, the Word 'Landowner' shall include a Corporation, and also such Persons as are empowered by the Twenty-third Section hereof.

1 & 2 Vict.
c. 109.

IX. By 'the Improvement of Land' shall herein be meant all or any of the following Matters:

Interpreta-
tion of
'Improve-
ment of
Land.'

1. The Drainage of Land, and the straitening, widening, deepening, or otherwise improving the Drains, Streams, and Watercourses of any Land:
2. The Irrigation and Warping of Land:
3. The embanking and weiring of Land from the Sea or Tidal Waters, or from Lakes, Rivers, or Streams, in a permanent Manner:
4. The inclosing of Lands, and the straitening of Fences and Redivision of Fields:
5. The Reclamation of Land, including all Operations necessary thereto:
6. The making of permanent Farm Roads and permanent Tramways and Railways and navigable Canals for all Purposes connected with the Improvement of the Estate:
7. The clearing of Land:
8. The Erection of Labourers' Cottages, Farmhouses, and other Buildings required for Farm Purposes, and the Improvement of and Addition to Labourers' Cottages, Farmhouses, and other Buildings for Farm Purposes already erected, so as such Improvements or Additions be of a permanent Nature:
9. Planting for Shelter:
10. The constructing or erecting of any Engine-houses, Water-wheels, Saw and other Mills, Kilns, Shafts, Wells, Ponds, Tanks, Reservoirs, Dams, Leads, Pipes, Conduits, Watercourses, Bridges, Weirs, Sluices, Floodgates, or Hatches, which will increase the Value of any Lands for agricultural Purposes:

11. The Construction or Improvement of Jetties or Landing Places on the Sea Coast, or on the Banks of navigable Rivers or Lakes, for the Transport of Cattle, Sheep, and other agricultural Stock and Produce, and of Lime, Manure, and other Articles and Things for agricultural Purposes; provided that the Commissioners shall be satisfied that such Works will add to the permanent Value of the Lands to be charged to an Extent equal to the Expense thereof:

12. The Execution of all such Works as in the Judgment of the Commissioners may be necessary for carrying into effect any Matter herein-before mentioned, or for deriving the full Benefit thereof.

X. The Word 'Person' shall in this Act include Companies and all other Corporations.

And with regard to the Proceedings preliminary to the Sanction of any Improvements, be it enacted as follows:

XI. When any Landowner shall be desirous of borrowing or advancing Money under this Act for the Improvement of his Land, he shall make an Application to the Commissioners to sanction the proposed Improvements in such Manner and Form and stating such Particulars as the Commissioners shall from Time to Time direct; and until the proposed Improvements shall have been sanctioned by the Commissioners in Manner herein-after mentioned, the Application may be withdrawn or altered, or consolidated with any other Application, at the Pleasure of the Applicant, but without Prejudice to his Liability as herein-after mentioned for the Expenses incurred by the Commissioners or their Officers in consequence of his Application.

XII. Any Two or more Landowners may, with the Consent of the Commissioners, join in an Application to them to sanction the Improvement of the Lands of such Landowners respectively, but the Sum to be charged in pursuance of any such joint Application shall be apportioned so that a separate and distinct Sum may become charged on the Land of each Landowner.

XIII. The Commissioners may from Time to Time frame and circulate, as they shall see Occasion, Forms indicating the Particulars of the Information to be furnished to them by Landowners for the Purposes of this Act, and such other Forms as the Commissioners may deem expedient for facilitating any Proceedings under this Act.

XIV. The Commissioners may require Security to be given to them by the Landowner, by Bond, Deposit, or otherwise, in such form as they may think fit, for the Payment to them of the Expenses which they or their

Interpretation of 'Person.'

Proceedings preliminary to Sanction of Improvements.

Application to Commissioners to sanction Improvements.

Joint Application by several Landowners.

Commissioners may issue Forms;

require Security for Expenses;

Officers shall incur in respect of the Investigation on any Application, and, if they shall issue such provisional or other sanctioning Order as herein-after mentioned, of the Expenses which they or their Officers shall incur in inspecting and ascertaining the due Execution of the Works; but unless the Commissioners shall issue such absolute Order as herein-after mentioned, such Payment shall not be a Charge on the Land to which such Application relates, but shall be a Debt due by the Person making such Application to the Commissioners, and shall be recoverable by them as in the Nature of a Crown Debt.

XV. If the Commissioners shall think fit to entertain the Application so made to them, they may cause the Land to be inspected and examined by an Assistant Commissioner, or an Engineer or Surveyor, who shall have regard to and examine the Proposals and Statements contained in such Application, and shall report his Opinion thereon, and who shall also report whether in his Judgment the proposed Improvements will effect a permanent Increase of the yearly Value of the Land exceeding the yearly Amount proposed to be charged thereon in respect of the Improvements applied for; and the Commissioners may by themselves, or any Assistant Commissioner, Engineer, or Surveyor, make such other Inquiries in relation to any such Application as they shall think fit: Provided that the above Requisition as to increased annual Value shall not apply to any Outlay proposed to be made upon or in respect of planting only.

cause Application to be investigated;

XVI. The Commissioners shall have Power to require such Alterations as they shall think expedient to be made in the Improvements proposed, or in the proposed Mode of executing them.

and require proposed Improvements to be modified.

XVII. Before the Commissioners shall sanction any Improvements, Notice shall be given of the Application as well by Advertisement inserted in Two successive Weeks in some Newspaper published in the County in which the Land to be improved lies, or in case there shall be no such Newspaper published in such County then in some County adjoining thereto, as by a Notice in Writing given, where such Lands are situate in *England* or *Ireland*, to every Person entitled to any Estate in such Land, or any Part thereof, in reversion or remainder, up to and inclusive of the Person entitled to the first vested Estate of Inheritance therein, and to every Person entitled to any Mortgage upon such Land or any Part thereof who by reasonable Inquiry shall be known to be so interested, and given, where such Lands are situate in *Scotland*, to the nearest Heir or Heirs of Entail, not exceeding Three, and

Advertisements and Notices preliminary to Sanction.

to the Holders of every Heritable Security on such Lands appearing upon the Records; and in such Advertisements and Notices respectively shall be stated the maximum Amount which it is proposed to charge in respect of the Improvements, and the greatest and least Terms over which it is proposed that the Rentcharge should be spread; and the Commissioners shall not sanction the Improvements until One Month shall have elapsed from the Publication of the Second of such Advertisements and the Service of such Notices (if any) respectively, of which Publication, and of the Service of all necessary Notices as aforesaid, the Landowner shall, if required by the Commissioners, satisfy them by One or more Statutory Declarations made by him or on his Behalf.

Power of
Dissent by
Persons
interested,
and Pro-
tection of
Land-
owner's In-
fant Chil-
dren.

XVIII. In case any Person having any Estate in or Charge or Security on the Land to be improved shall within the Month named in the last preceding Section signify in Writing to the Commissioners his Dissent from such Application, stating therein the Nature of his Estate in or Charge or Security on such Land, the Commissioners shall certify such Dissent to the Landowner by whom the Application was made, and shall not make any provisional or other Order sanctioning the Improvements unless or until such Dissent be withdrawn, or an Order be made by the High Court of Chancery in *England* or *Ireland* respectively, or by the Court of Session in *Scotland*, in manner herein-after provided, authorizing the Commissioners to sanction the same; nor shall they make any provisional or other Order sanctioning the Improvement of any Land in the Case of which the Landowner, or the Husband of the Landowner, shall be the Father of the Person or Persons entitled either at Law or in Equity to any Estate in such Land, or any Part thereof, in reversion or remainder, up to and inclusive of the Person entitled to the first vested Estate of Inheritance, and such Person or Persons, or any of them, shall be an Infant or Infants, or a Minor or Minors, unless or until such an Order as herein-before mentioned shall be made by such Court as aforesaid.

The same
in case of
navigable
Rivers and
Canals.

XIX. If the Commissioners shall consider that any proposed Improvement would interfere with any navigable River or Canal respectively vested in or under the Management or Control of any Commissioners, Trustees, Conservators, Undertakers, Company, or other Body or Individuals, or the Banks or other Works or Conveniences thereof, or would occasion the Flow or Discharge into such River or Canal of any Drainage or other Matter, the Landowner shall give notice of the Application in Writing, together with a plan and Section of the

proposed Improvement, to such Commissioners, Trustees, Conservators, Undertakers, Company, or other Body or Individuals; and in case they shall, within One Month after the Receipt of such Notice, signify in Writing to the Commissioners their Dissent from such Application, and state the Nature of their Interest in or Authority over such River or Canal, the Commissioners shall certify such Dissent to the Landowner by whom the Application was made, and shall not sanction the Improvement unless or until such Dissent be withdrawn, or an Order be made by the High Court of Chancery in *England* or *Ireland* respectively, or by the Court of Session in *Scotland*, in Manner herein-after provided, authorizing the Commissioners to sanction the Improvement.

XX. When the Land to which the Application relates, or any Part of such Land, is held in right of any Church, Chapel, or other Ecclesiastical Benefice, the Commissioners shall not sanction any Improvement of such Land, or of so much thereof as is so held, unless and until the Patron of the Benefice, and in *England* and *Ireland* the Bishop of the Diocese, and in *Scotland* the Presbytery of the Bounds, shall signify to the Commissioners, by Writing under their Hands, their respective Consents to such Application.

Consents
necessary
in case of
Church
Lands.

XXI. If and when any Dissent from any such Application to the Commissioners for their Sanction of proposed Improvements shall have been notified in Writing to the Commissioners, either by a Party interested in the Lands proposed to be improved (not being Lands held in right of any Church, Chapel, or other Ecclesiastical Benefice), or by the Commissioners, Trustees, Company, or other Body or Individuals interested in any River or Canal which would or might be interfered with as herein-before mentioned, or if the Landowner, or the Husband of the Landowner, shall be the Father of the Person or Persons entitled either at Law or in Equity to any Estate in the Land to be improved, or any Part thereof, in reversion or remainder, up to and inclusive of the Person entitled to the first vested Estate of Inheritance, and such Person or Persons, or any of them, shall be an Infant or Infants, or a Minor or Minors, the Landowner desiring such Improvements may apply to the High Court of Chancery in *England* or *Ireland* where such Lands are situate in *England* or *Ireland* respectively, or to the Court of Session where such Lands are situate in *Scotland*, for an Order of such Court authorizing the Commissioners to entertain and proceed upon the Application for such proposed Improvements notwithstanding such Dissent or Circumstance;

In case of
Dissent,
or when
Land-
owner's
Infant
Children
are to be
protected,
Court of
Chancery
or Session
may autho-
rize Com-
missioners
to proceed.

and such Application shall be made, as to Lands in *England*, to the Master of the Rolls or any One of the Vice Chancellors sitting at Chambers, by Summons, calling on the Party dissenting to show Cause why such Order should not be made; as to Lands in *Ireland*, to the Master of the Rolls, by summary Petition or otherwise, as he shall by any General Order direct; and as to Lands in *Scotland*, to either Division of the Court of Session in Time of Session, or to the Lord Ordinary sitting on Bills in Time of Vacation, by summary Petition; and the Court or single Judge, as the Case may be, to whom such Application shall be made, shall hear and determine such Application, and for that Purpose shall have Power to make or direct to be made all such Inquiries, and receive and entertain all such Statements and Evidence, on Oath or by Affidavit, as such Court or Judge may consider necessary or desirable, or as may be produced before them or him; and if upon a Consideration of all the Circumstances such Court or Judge shall be of opinion that the Commissioners should entertain and proceed upon such Application, an Order shall be made authorizing and requiring them to proceed thereon, and to deal with the same according to the Provisions of this Act authorizing them in that Behalf, notwithstanding such Dissent or Circumstance as aforesaid: Provided that if at any Time after Notification of such Dissent, and before any such Order shall have been applied for and made as aforesaid, such Dissent shall be withdrawn by a like Notification in Writing, it shall not be necessary to make or proceed with such Application, or to obtain such Order.

Service of
Notice
under pre-
ceding
Clause;

XXII. Where any Party dissenting shall be out of the Jurisdiction of the Court, it shall be lawful for the Court or Judge to order Service to be made in such Manner as such Court or Judge may think fit, and upon Proof to the Satisfaction of such Court or Judge that such Party has had actual Notice within a reasonable Time of such intended Application, it shall be lawful for such Court or Judge thereupon to hear and determine such Application.

and Costs
may be
given by
the Court.

XXIII. The Costs of and incidental to every Application under the Twenty-first and Twenty-second Sections, and the Mode in which such Costs shall be settled or taxed, shall be in the Discretion of the Court or Judge who shall hear such Application, and if such Court or Judge shall so direct, the said Costs shall be deemed to be Part of the Expenses of and incidental to the Application for the proposed Improvements.

Repre-
sentation of

XXIV. All Husbands, Guardians, Tutors, Committees, Curators, Feoffees, Trustees, Judicial Factors, Execu-

tors, and Administrators shall respectively have the same Rights and Powers of making Applications and signifying Dissents, and taking other Proceedings under this Act, as their respective Wives, Infants, Minors, Lunatics, Idiots, and furious or fatuous Persons would have had if free from Disability, or as such Feoffees, Trustees, Judicial Factors, Executors, or Administrators respectively would have had if the Estates, Charges, or Interests of which they shall be such Feoffees, Trustees, or Judicial Factors, or which shall be vested in them as such Executors or Administrators, had been vested in them in their own Right; but no Guardian, Tutor, Committee, Curator, Feoffee, Trustee, Judicial Factor, Executor, or Administrator shall be in anywise compelled or obliged to signify a Dissent from any Application under this Act, or be in anywise responsible for the Consequences of such Application, or of any Charge made in pursuance thereof.

And with regard to the Sanction of any Improvements, and the Rights arising thereunder, be it enacted as follows:

XXV. If the Commissioners shall find that the proposed Improvements or any Part thereof, whether with or without any Alterations by them required or sanctioned, would effect a permanent Increase of the yearly Value of the Lands proposed to be improved, or of any Part thereof, exceeding the yearly Amount proposed to be charged thereon, they shall sanction such Improvements, or such Part thereof as they shall think expedient, if under the preceding Sections it shall be lawful for them so to do, by an Order under their Hands and Seal; and they shall by the same Order fix the Rate of Interest to be allowed on the Cost of the sanctioned Improvements, having regard to the Market Value of Money at the Time, but such Interest shall never exceed Five *per Cent. per annum*.

XXVI. The Commissioners shall from Time to Time prepare Forms of Orders for sanctioning Improvements, and shall also, whenever required by the Landowner so to do, frame and entitle their said Orders under this Act in such Manner that they may also be and operate as provisional, sanctioning, or other corresponding Orders under the respective Acts applying to any Company with which he may have contracted relating to the Loan or Improvements in question: Provided that every Order operating under this Act to sanction any Improvements shall name the Landowner to whom it is issued; shall express the greatest Sum to be charged in addition to any Costs, Charges, and Expenses under the Fiftieth Section hereof,

Persons under Disability for Applications and Dissents under preceding Clauses.

Sanction of Improvements, and Rights thereunder.

Commissioners' Order sanctioning Improvements.

Forms of Orders sanctioning Improvements to be prepared by Commissioners; what they must contain.

and the Rate of Interest and Term of Years for the Repayment thereof, the former not exceeding Five *per Centum per Annum*, and the latter not exceeding Twenty-five Years; shall specify the Lands on which such Repayment is to be charged; and shall either express or refer to some Contract or other Document expressing the general Scheme of the Improvements to be executed.

They may be called Provisional Orders, and may be assigned to Parties agreeing to execute Improvements.

XXVII. Every Order operating under this Act alone to sanction any Improvement may be in the Form set forth in Schedule (A.) hereto, and shall be called a Provisional Order, and shall, subject to the following Section hereof, create in favour of the Landowner named therein the Title to an absolute Charge on the Completion of the sanctioned Improvements, which Title such Landowner may assign, either absolutely or by way of Security, to any Person; and such Assignment may be made by Endorsement on the Provisional Order.

Provision for Death of Landowner pending Completion of Improvements.

XXVIII. In case of the Death of any Landowner, or the Determination of his Interest, between the Date of the Provisional Order and the Completion of the Improvements sanctioned thereby, the Right to complete such Improvements, and to assign the Title to an absolute Charge, shall pass to the succeeding Landowner; but if the succeeding Landowner shall not within Three Calendar Months after his Succession proceed with the Works, so as to complete the same in conformity with the Provisional Order, the preceding Landowner, or in case of his Decease his Executors or Administrators, may complete such Improvements, and shall become entitled to have the absolute Charge executed to him or them. If the succeeding Landowner shall complete the Improvements there shall be distinct absolute Charges executed to such Landowner, and the preceding Landowner or his personal Representatives, for the Outlay made by the preceding and succeeding Landowners respectively, and in case of Difference the Commissioners shall determine the Proportions; provided that the succeeding Landowner may, with the Sanction of the Inclosure Commissioners, and after Notice to the Parties to whom Notice was originally given, or such of them as may be living, and such other Persons, if any, as the Commissioners may direct, terminate the Proceedings under the Provisional Order, on Payment of the Outlay and Expenses made thereunder, and indemnifying the Person to whom the Title to the absolute Charge may have been assigned. Notwithstanding the foregoing Provisions, if the Title to an absolute Charge shall have been assigned by the preceding Landowner, the Assignee may complete the Improvements if he shall proceed therewith

within One Calendar Month from the Time the preceding Landowner ceased to be such Landowner.

XXIX. The Commissioners may from Time to Time, on Application to be made by the Landowner, and after such Inquiry as they shall think fit, sanction any Modifications or Alterations either of the Scheme of the Improvements or of any other Matter expressed or referred to in the Provisional Order: Provided that no such Modification or Alteration shall increase the Sum to be charged in respect of the Improvements, or extend or curtail the Term of Repayment, beyond the greatest Amount which it was proposed so to charge, or the greatest or least Term over which it was proposed that the Rentcharge should be spread, as respectively stated in the Advertisement and Notices herein-before required: Provided also, that every such Modification or Alteration shall require the Consent of every Party who, by having contracted for the Execution of the Improvements, or by having taken an Assignment of the Title to an absolute Charge, or otherwise, may be interested therein; and the Modifying Order shall be in such Form as the Commissioners shall from Time to Time appoint, and shall be construed together with the original Order as One Order with respect to all Rights arising thereunder after the Date of the Modifying Order.

Provisional Orders may be modified.

And with regard to the Execution of any Improvements, be it enacted as follows:

Execution of Improvements.

XXX. Before the Commencement of any Improvements sanctioned in manner aforesaid the Landowner shall deliver to the Commissioners a detailed Specification thereof, and in the Case of Buildings, and also in any other Case where the same shall be required by the Commissioners, a detailed Plan or Drawing: Provided that when it is not intended to complete the Improvements within One Year from the Date of the provisional or other sanctioning Order, the Specification and Plan or Drawing first delivered may comprise so much only as it is intended to complete within One Year from the said Date, so, however, that for the Works of each successive Year such Specification and Plan or Drawing as aforesaid be always delivered in advance.

Detailed Specifications to be delivered in advance;

XXXI. The Specifications and Plans or Drawings aforesaid shall be examined and, if necessary, the Spot visited by an Assistant Commissioner, or an Engineer or Surveyor, who shall report whether in his Judgment the Improvements as proposed to be effected will be effected in a substantial and durable Manner, and, in the Case of Farm Buildings, whether the same, or the Improvements thereof or Additions thereto, will be suitable to the Locality;

and approved before Execution of Works.

and no Improvement shall be commenced or proceeded with until the Specifications and Plans or Drawings aforesaid shall have been approved by the Commissioners; but nothing herein contained shall render necessary the Redelivery, Re-examination, or Reapproval of any detailed Specifications, Plans, or Drawings which may have been delivered in connection with the Application for the Commissioners' Sanction to the general Scheme of the Improvements, and may have been approved in connection with that Sanction.

Adjoining Lands, or Easements over them, may be sold for Purpose of Improvements, and Conveniences over adjoining Lands for the Execution of Improvements contracted for.

XXXII. All Persons interested in any Lands adjoining or near to the Land improved or proposed to be improved, and being, as to Lands in *England* or *Ireland* by the Provisions of 'The Lands Clauses Consolidation Act, 1845,' and as to Lands in *Scotland* by the Provisions of 'The Lands Clauses Consolidation (*Scotland*) Act, 1845,' enabled to sell and dispose of such Lands so adjoining or near, or any Estate or Interest therein, may, for the Purpose of any Improvements authorized by this Act, sell and convey or grant to the Landowner whose Land has been or is proposed to be improved such Lands so adjoining or near, or any Part thereof, or any Easement, Authority, or Right in, through, over, or affecting the same, and any such Land, Easement, Authority, or Right so sold and conveyed or granted shall thereupon become appurtenant to or pertinent of the Lands improved or proposed so to be, and with reference to the Improvements whereof the same was purchased, and shall be held upon and subject to the same Uses, Trusts, Charges, and Incidents; and all such Persons as aforesaid may also make any Agreement with the Landowner, or with any Person or Company that shall have contracted for the actual Execution of the Improvements, or their respective Agents, with reference to entering on, cutting through or into, or prejudicially affecting such Lands so adjoining or near; and every such Sale, Conveyance, Grant, and Agreement shall be valid and effectual accordingly, and the Price or Consideration shall be settled by Two Surveyors or a Surveyor to be appointed by them in manner provided by the Ninth Section of 'The Lands Clauses Consolidation Act, 1845,' or, as the Case may be, by the Ninth Section of 'The Lands Clauses Consolidation (*Scotland*) Act, 1845,' and shall be deposited as directed by the same respective Sections, and thenceforth become subject to the Provisions of the same respective Acts.

Works necessary to be made on adjoining

XXXIII. Whenever the Commissioners shall think that it may be expedient, in order to obtain or improve an Outfall for draining or warping any Lands under this Act,

or otherwise with a view to the Improvement of any Lands under this Act, to enter and execute any Works upon any Land adjoining or near to the Land proposed to be improved, where, by reason of the Objection or Disability of any Owner, Lessee, or Occupier of such Land, such Works could not be otherwise executed, Proceedings may be taken, if the said lands shall lie in *England*, either under the Provisions of the Act of the Tenth and Eleventh Years of the Reign of Her present Majesty, Chapter Thirty-eight, intituled *An Act to facilitate the Drainage of Lands in England and Wales*, or under those of the Third Part of the Land Drainage Act, 1861, and, if in *Scotland*, under the Provisions of the Act of the Tenth and Eleventh Years of the Reign of Her present Majesty, Chapter One hundred and thirteen, intituled *An Act to facilitate the Drainage of Lands in Scotland*, but as though in such Act the Inclosure Commissioners for *England and Wales* had everywhere been named in place of the Sheriff; and if such Proceedings shall have been taken before the Sanction of the Improvements in question by the Commissioners under this Act, the Commissioners may, by their Order sanctioning such Improvements, declare the Works in respect of which they shall have been taken to be expedient, and such Works shall then be deemed to have been authorized by the Commissioners or by the Sheriff, as the Case may be, and the Provisions of the said respective Acts shall apply to them accordingly.

Lands for Execution of Improvements may be made under certain Acts.

XXXIV. Every Provisional or Modifying Order shall be a full Authority to the Landowner or successive Landowners and their Representatives in the respective Cases herein-before defined, and to all Persons employed by or under Contract with him or them respectively, to enter upon the Lands to be improved, and any adjoining or neighbouring Lands acquired or authorized to be entered under either of the Two last preceding Sections, and to execute in and on the same, without Impeachment of Waste by any Remainderman or Reversioner, all the Improvements sanctioned by the same Order according to the Specifications and Plans or Drawings approved by the Commissioners, and to do, execute, and use all such Acts, Works, and Conveniences as may be proper for making, maintaining, and using such Improvements; and for the Purpose of effecting any Improvement under this or the recited Acts it shall be lawful to get and work Freestone, Limestone, Clay, Sand, and any other Mineral or Substance out of the Land to be improved for charged, and to make Tramroads and other Ways, and to burn and make Bricks, Tiles, and other Things to be used in effecting such

Provisional Order to protect from Impeachment of Waste, and to authorize getting Materials from Land, etc.

Improvements, and also for the same Purpose to cut down and use any Timber or Trees not planted or serving for Shelter or Ornament.

[§§ XXXV.-XLVIII. Saving Rights of the Crown, Public Departments, and Corporations.]

*Charges for
Improvements.*

And with regard to Charges for Improvements under this Act, be it enacted as follows :

Commissioners to execute Charge on Completion of Works, or of some Part thereof.

XLIX. When the Commissioners are satisfied that the Improvements sanctioned by them, or some Part thereof, have been properly executed, either according to the Specifications and Plans or Drawings approved of by them, or with such Deviations therefrom as in their Judgment will not diminish the permanent Benefit accruing from such Improvements to the Lands wherein they have been made, they shall execute a Charge under their Hands and Seal upon the Inheritance or Fee of the Lands comprised in the provisional or other sanctioning Order, or some sufficient Part thereof, for the Sum by the same Order expressed to be chargeable in respect of such Improvements, if all the said Improvements have been completed, or for a proportional Part of such Sum if a Part only of the said Improvements has been executed, together, in either Case, with the Interest by the same Order expressed, and with the Amount (if any) which shall have been paid in respect of the Purchase of adjoining Lands, or of any Easement, Authority, or Right in, through, over, or affecting adjoining Lands, with Interest thereon at the like Rate.

Expenses of Application and certain Contracts may be included in Charge.

L. If the Landowner is desirous that the Inheritance or Fee of the Lands improved should be charged with the Expenses of and incident to his Application to the Commissioners, or his Contract with any Company or Person relating to the Execution of the Improvements, or to the Advance of Money for their Execution, the Commissioners may ascertain the Amount of the Costs, Charges, and Expenses properly incurred preparatory or in relation to and consequent on such Contract, and the Application to the Commissioners or either of them, and may include in the Principal Money charged on the Inheritance or Fee of such Lands the Amount of such Costs, Charges, and Expenses, and of the settled or taxed Costs, if any, which a Court or Judge shall have ordered as aforesaid to be deemed and taken to be Part of the Expenses of and incident to the Application for Improvements, or such Part thereof as the Commissioners think fit ; and the Commissioners may also include in such Principal Money Interest at a Rate not exceeding Five Pounds *per Centum per Annum* on all Payments forming Part of the same Principal Money from the respective Dates of such Payments to

that of the Absolute Order, but so that no Interest shall be allowed on any such Payment for more than Six Years; provided that the total Amount of the Principal Money to be charged on the Lands improved under the Provisions of this Act shall not in any Case exceed that to which, in the Opinion of the Commissioners, the Inheritance or Fee of the Lands improved will be durably benefited by the Improvements.

LI. Every Charge under this Act shall be created by way of Rentcharge, payable half-yearly, extending over the Term of Years fixed by the provisional or other sanctioning Order, and the first Payment thereof to be made Six Months after the Time when the Works in respect of which the same was granted were executed to the Satisfaction of the Commissioners; and the Payment for each Half Year shall be, and be expressed to be, as to part thereof a Repayment of a certain Amount of Principal Money, and as to the Remainder thereof a Payment of Interest; and the Charge shall be duly stamped for denoting Payment of the proper *ad valorem* Stamp Duty which would be payable on a Mortgage for securing the like Amount as the Principal Money thereby charged, and shall be called an Absolute Order; and a Copy of every such Absolute Order shall be authenticated by the Seal of the Commissioners, and shall be kept by them; and such Copy, and any Copy thereof authenticated by their Seal, shall be Evidence of the Contents and Purport of the same Absolute Order.

The Charges to be by way of Rentcharge created by Absolute Order;

LII. Charges under this Act shall be made according to the Form in the Schedule (B.) hereto annexed, or as near thereto as the Circumstances of the Case will admit.

LIII. Whenever, by Assignment, under the Twenty-sixth Section hereof or otherwise, a Company having Power to execute or advance Money for the Improvement of Land shall become entitled to the Creation of any Charge under either the Forty-ninth or the Seventy-eighth Section hereof, the Commissioners shall, if required, but subject to the Provisions herein-before contained, create such Charge in the Form of, and so that it may also operate as, an absolute or other corresponding Order under the Act or Acts applying to such Company.

and may be made according to Form in Schedule (B).

Expenditure made under this Act may be charged under Acts of Improvement Companies.

LIV. Any Company authorized by Act of Parliament to execute or advance Money for the Improvement of Land, by giving notice to the Commissioners of their Intention to avail themselves of any of the Powers given by this Act, shall be held to have adopted the same, and thenceforth all the Procedure of such Company shall be carried on under and in accordance with this Act only; and any such Company which shall adopt this Act as herein-before pro-

Improvement Companies may exercise the Powers of this Act, on conforming to its Procedure. As also Com-

panies au-
thorized to
execute
Improve-
ments in
the United
Kingdom.

vided may, with the Sanction of Three Fourths of the Shareholders present at an Extraordinary Meeting of the Company specially convened for the Purpose, execute or advance Money for the Execution of any Improvement authorized by this Act in any Part of the United Kingdom, although not so authorized by any Act or Acts relating to the Company.

Absolute
Order to be
conclusive
Evidence
of Charge.

LV. The Execution of the Absolute Order by the Commissioners shall be conclusive Evidence in all Courts, and for all Purposes, of the Validity of the Charge thereby expressed to be made, and no Inquiry shall be permitted either into the Title or Estate of the Landowner, or into the due Performance of anything required to be done by this Act, or as to any other Matter on which the Validity of such Charge might but for this Enactment have depended.

Registry of
Rent-
charges in
Ireland,
Middlesex,
Yorkshire,
and Scot-
land.

LVI. A Memorial of every Absolute Order of the Commissioners whereby a Rentcharge is created on Land in *England* and *Wales*, in pursuance of this Act, shall be registered at the Office of the Land Registry in *England*, and a Memorial of every Absolute Order of the Commissioners whereby a Rentcharge is created on Land in *Ireland*, in pursuance of this Act, shall be entered in the proper Office for the Registration of Deeds and Wills, and such Memorials respectively shall express and contain the Date of the Order, the Name and Address of the Landowner, the Particulars of the Lands charged, the Amount of the Rentcharge, and the Period during which the same shall be made payable; and the Production of the Absolute Order, sealed with the Seal of the Commissioners, shall be a sufficient Authority to the Registrar for the Entry of such Memorial at the proper Registry Office; and all Grants of Rentcharges on Lands in *Scotland* shall be registered in the General or Particular Register of Sasines: Provided that every Rentcharge to which the present Clause applies shall have Priority as herein-after declared, any Law or Usage to the contrary notwithstanding.

Landowner
may bor-
row the
Amount of
certain
Public As-
sessments,
and charge
same on In-
heritance;

LVII. Whenever by or under the Provisions of any Act of Parliament, Royal Charter, or Commission under the Great Seal or the Seal of the Duchy of *Lancaster* any public or general Works of Drainage or other Improvements shall be required or authorized to be executed, and the Cost thereof shall be directed or authorized to be assessed or charged upon the Inheritance of the Lands improved, then any Landowner who shall, under such Act, Charter, or Commission, have been assessed, and shall have become liable to pay any Sum of Money so chargeable for or towards such Works and Improvements, or any of them,

in respect of his Land, may apply to the Commissioners to sanction the Money so assessed being charged upon the Land in respect of which such Landowner shall have been so assessed; and if the Commissioners shall be satisfied that the Works or Improvements have been executed in accordance with the Requirement or Authority in such Act, Charter, or Commission contained, they may, after the Money shall have been duly paid by such Landowner, by an Absolute Order within the Meaning of the Fifty-first Section hereof, charge upon the Inheritance or Fee of the Land in respect of which such Landowner shall have been so assessed the Amount so assessed and paid, or such Part of it as the Commissioners may be willing to sanction, to be repaid with Interest.

LVIII. Such Absolute Order and Charge may be made in any Form and for any Term permitted by this Act, and all the Provisions hereof shall apply thereto in the same Manner and with the same Effect and Operation in all respects as if such Order and Charge had been made in respect of Improvements upon the said Land executed under the Powers of this Act; and if the Landowner is desirous that the Inheritance or Fee of the said Land should be charged with the Costs, Charges, and Expenses of and incident to the said Application and Order, or any Contract connected therewith, the Provisions of the Fiftieth Section hereof shall extend and apply to the present Case in the same manner as to the Costs, Charges, and Expenses of the Application and Contracts in the said Fiftieth Section mentioned.

in Form specified, together with Costs of Application.

LIX. From the Date of the Absolute Order, the Grantee thereof, and his Executors, Administrators, Successors, and Assigns, shall have a Charge on the Lands therein comprised for the Principal Money from Time to Time remaining undischarged, by Payment of the Rentcharge, with Interest, at the Rates in the several Cases herein-before respectively expressed, and such Charge shall have Priority over every other then existing and future Charge and Incumbrance affecting such Lands or Estates and Interests respectively, whether created under the Powers of any Act of Parliament or otherwise, except Quit Rent, Crown Rents, Chief Rents, Feu Duties, Ground Annuals, and other Charges incident to Tenure, Titho Commutation Rentcharges and Teinds, Charges created or to be created under any Act authorizing Advances of public Money for the Improvement of Land, and any Charges created under this Act or Charges of prior Date created under any other existing Act of Parliament autho-

Grantee to have Charge for Principal Money from Time to Time unrepaid, with Priority over other Incumbrances.

rizing the charging of Lands with the Expense of and incident to their Improvement: Provided that in case a Part only of the Land charged is subject to a Mortgage or other Incumbrance, the Charge created under the Authority of this Act shall have Priority over the Mortgage or other Incumbrance only to the Extent of a due Proportion of such Charge, when and so soon as the same shall be ascertained under and pursuant to the Sixty-sixth Section of this Act.

Charges to be Personal Property, but Money authorized to be invested on Real Security may be invested therein, or on Mortgages thereof.

LX. Every Charge under this Act shall, as regards the Holder thereof, be deemed to be Personal Property, except that any Holder of such a Charge, who shall desire to extinguish the same by reuniting it to the Land charged, shall have Power for that Purpose to direct by any Deed that it shall be reunited to and merge in the beneficial Interest in the said Land, as if it were of the same Nature and Tenure therewith; but all Trustees, Directors, and other Persons who may be directed or authorized to invest any Money on Real Security shall (unless the contrary be provided by the Instrument directing or authorizing such Investment) have Power, at their Discretion, to invest Money in such Charges, or on Mortgages thereof.

Charges not to preclude Trustees from investing in Purchase or on Mortgage of Lands.

LXI. No Charge on Land made by any Absolute Order by virtue of this Act shall be deemed such an Incumbrance as shall preclude a Trustee of Money, with Power to invest the same in the Purchase of Land or on Mortgage, from investing it in a Purchase or upon a Mortgage of the Land so charged, unless the Terms of his Trust or Power expressly provide that the Land to be so purchased or taken in Mortgage be not subject to any prior Charge.

Proprietor of Scotch Entailed Estate may avail himself of Act, and Rentcharge to be Charge on such Estate.

LXII. No Proprietor of an Entailed Estate in *Scotland* shall be held to have contravened the conditions of the Entail by reason of his having availed himself of the Provisions of this Act, and no Rentcharge imposed or created on any Entailed Lands in *Scotland* under the Authority of this Act shall be made use of as a Ground for adjudging, selling, or evicting such Lands, or any Part thereof, contrary to the Provisions and Conditions of the Entail, but every such Rentcharge shall be a good and effectual Charge upon and against such Entailed Lands to every other Effect, and upon and against the Rents and Profits thereof.

Rentcharges to be recoverable as Tithe Rentcharges or Feu Duties.

LXIII. Every Rentcharge on Land by virtue of this Act may be recovered by the Person or Company for the Time being entitled to the same, as to Lands in *England* or *Ireland*, by the same Means, and with the like Powers, and in like Manner in all respects as a Rentcharge in lieu of Tithes would be recoverable if charged on the same Land under the Act of the Seventh Year of King *William*

the Fourth for the Commutation of Tithes in *England* and *Wales*, or under the Act of the First and Second Years of the Reign of Her present Majesty to abolish Compositions for Tithes in *Ireland* and to substitute Rentcharges in lieu thereof, and the several Acts passed for amending the same, as the Case may be, and as if such Rentcharge by virtue of this Act were a Rentcharge in lieu of Tithes made payable to such Person or Company under the said Acts respectively, and as to Lands in *Scotland* by the same Means and in the like Manner in all respects as any Feu Duties or Rent or annual Rent or other Payment out of the same Lands would be recoverable.

LXIV. If any Rentcharge payable under this Act shall be in arrear, such Arrear shall not bear Interest for a longer Period than Six Months, but Interest at Five Pounds *per Centum per Annum* in respect of the same, for any Period not exceeding Six Months, may be recovered in the same Manner as the Sum in arrear: Provided that if, at the Expiration of Six Months from the Time of any Payment falling into arrear, there shall not be upon the Land charged a sufficient Distress to answer and satisfy the said Payment and Interest thereon for the said period of Six Months, together with the Costs and Charges of such Distress, then the Arrears of such Payment shall continue to bear Interest at the Rate of Five Pounds *per Centum per Annum* until Payment or satisfaction thereof, and such Interest may be recovered in the same Manner as the Sum in arrear.

Interest on
Arrears
of Rent-
charges.

LXV. The Grantee or other Person for the time being entitled to any Rentcharge created under this Act may assign the same by Deed duly stamped, and wherein the Consideration is truly stated; and such Assignment may be according to the Form in Schedule (C.) to this Act annexed or to the like Effect; and all Assignments made in such Form, or as near thereto as the Circumstances of the Case will admit, shall be effectual to vest, both at Law and in Equity, the Charge thereby assigned, and all the Powers, Authorities, Rights, and Remedies of the Assignor with reference to such Charge, in the Assignee, his Successors, Executors, Administrators, and Assigns respectively, and Notice of such Assignment shall be sent to the Commissioners at their Office in *London*.

Assign-
ment of
Charges.

LXVI. Every Landowner on whose Land a Charge shall have been made under this Act, and every succeeding Tenant for Life, Tenant in Tail, and other Person having a limited Interest in the Land so charged, shall, as between himself and the Persons in remainder or reversion, be bound to pay the yearly or other periodical Payments

Tenants
for Life to
keep down
Rent-
charges.

of such Charge which shall become payable during the Continuance of his Interest; and in case he be in the actual Occupation or entitled to an apportioned Part of the Rents and Profits of such Land up to the Time of the Termination of his Interest, he shall also be bound to pay an apportioned Part of the yearly Rent or other periodical Payment of such Charge which shall become due next after the Termination of his Interest, proportional to the Time which elapsed between the Day for the previous Payment and the Day of such Termination: Provided that no person becoming entitled in possession to any Estate or Interest in the Land shall be liable, as between himself and the Persons entitled to the Rentcharge, to pay any Arrears of the Charge remaining unpaid at the Time of his becoming so entitled in possession beyond the Amount of Two Years Payment of such Charge: Provided also, that the Amount paid by any Person in respect of such Arrears, and any Costs occasioned by Nonpayment thereof, shall be a Debt from the Person who in the first instance ought to have paid the same, or from his Estate, to the Person who paid the same, and shall be recoverable accordingly.

Tenant
may de-
duct Rent-
charge, un-
less he has
agreed to
pay it.

LXVII. If any Tenant or Occupier at a Rent join in the Application for an Improvement, or by Writing under his Hand signify to the Commissioners, or to an Assistant Commissioner or Engineer, his Consent to become charged with the Charge, or an apportioned Part thereof as herein-after mentioned, such Tenant or Occupier shall during his Tenancy or Occupation be liable to pay the Charge, or an apportioned Part thereof as herein-after mentioned; and in case the Charge be made in respect of the Improvement as well of other Land as of the Land included in such Tenancy or Occupation, the Commissioners may, upon such Consent of the Tenant or Occupier, declare in the Absolute Order what Portion of the whole Charge payable in respect of the Improvement shall be payable by such Tenant or Occupier during his Tenancy or Occupancy in respect of the probable Improvement of the Land included in his Tenancy or Occupation; but, except as aforesaid, every Tenant or Occupier who pays such Charge shall be entitled to deduct the Amount thereof from the Rent payable by him to the Landowner, and shall be allowed the same in Account with him.

Rent-
charges
may be
apportion-
ed, or Part
of the Land
charged re-

LXVIII. If at any Time Land charged under this Act, or under any other Act authorizing the Creation of Charges by the Commissioners, is occupied in separate Farms or other Holdings, or has become the Property of separate Owners, or the Owner thereof is entitled thereto under separate

Titles or for distinct and separate Interests, or is desirous to sell or dispose of Part of such Land, or Part only of such Land is subject to any Mortgage or other Incumbrance, or for any other Reason it would be desirable that the Charge should be apportioned or a Part of the Land charged released therefrom, the Commissioners may, with the Consent of the Landowner, or if the Land has become the Property of separate Owners, or a Part thereof is subject to any Mortgage or Incumbrance, then upon the Application of any One of such Owners, or of such Mortgagee or Incumbrancer, but in every case with due Notice to the Grantee or Assignee of the Charge, or the Husband, Guardian, Tutor, Curator, Committee, or Trustee of such Grantee or Assignee, if a married Woman, Infant, Lunatic, Idiot, or furious or fatuous Person, and to such other Parties (if any) as the Commissioners think right, either release from such Charge any Part of the Land charged therewith, or apportion such Charge so that a separate and distinct Charge may become charged on each separate Farm or Holding, or on the Land of each Landowner, or on the Land held under each separate Title or for each distinct and separate Interest, or on the Part or each Part which the Landowner is desirous to sell or dispose of and the Part intended to be retained by him, or on the Part subject to such Mortgage or other Incumbrance and on the Residue, or on any other separate Parts of the Land, but so that no Charge charged under such Apportionment shall be less than Twenty Shillings for each half-yearly Payment: Provided that no Lands shall, in consequence of any such Apportionment or Release, become charged with any greater Amount than that to which, in the Opinion of the Commissioners, they have been durably benefited by the Improvements in respect of which such Charge was created.

leased
therefrom.

LXIX. Every such Apportionment or Release shall be made by an Order under the Hands and Seal of the Commissioners, and shall be in the Form set out in Schedule (D.) or (E.) to this Act, as the Case may be, or as near thereto as Circumstances will permit, and as to Lands in *England and Wales*, or in *Ireland or Scotland*, shall be registered in the Manner mentioned in the Fifty-fourth Section hereof, or as near thereto as Circumstances will permit; and a Copy of every such Order shall be authenticated by the Seal of the Commissioners, and shall be kept by them; and such Copy, or any Copy thereof authenticated by their Seal, shall be conclusive Evidence in all Courts and for all Purposes of the Contents and Purport of the same Order, and of the Validity of the

Form, Registry, and Effect of Orders of Apportionment and Release.

Apportionment or Release thereby expressed to be made; and such Order shall take effect from the Date thereof, subject to the Continuance of all Rights and Remedies for the Recovery of Monies which before the Date thereof may have become payable out of any Lands under the Charge so apportioned or released.

Charges apportioned, or from which Part of the Lands have been released, to be deemed original Charges.

LXX. Every Charge apportioned or released as aforesaid shall be recoverable out of the Lands on which the same is charged by the Order of Apportionment, or which shall not by the Order of Release be released therefrom, in the same Manner as if the same had been originally charged on such Lands respectively, and shall, for all the Purposes of this Act, or of the Act under which the original Charge was created, be deemed to be an original Charge on such Lands by Absolute Order.

Several Charges may be dealt with in One Order of Apportionment or Release.

LXXI. Where any Lands are charged by more than One Absolute Order, any Order of Apportionment or Release under the preceding Sections hereof may comprise all or any Number of the Rentcharges existing by virtue of such Absolute Orders.

[§§ LXXII.-LXXVII. provide for the upholding of Improvements executed under the authority of the Act.]

Subscription to Railways.

And with regard to charging Lands with Moneysubscribed for the Construction of Railways, be it enacted as follows:

Conditions for Application to Commissioners.

LXXVIII. In case any Landowner shall be desirous of subscribing for any Shares or Stock in the Capital, whether original or additional, of a Company having Power to construct a Railway or navigable Canal, or any Branch or Extension Railway or navigable Canal, or any Deviation of a Line of Railway or a navigable Canal already sanctioned, the Works for which such Subscription is to be made being unfinished, or in any additional Capital to be raised for the Completion of any such Railway, Canal, Branch, Extension, or Deviation, the same being upon or near to and which will improve or benefit the Lands of such Landowner, and who shall be desirous that such Amount, or any Part thereof, may be charged upon the Lands so to be improved, it shall be lawful for him to apply to the Commissioners for that Purpose within the Time limited by the Railway or Canal Company's Act or Acts for the Construction of the Works in question.

Commissioners' Proceedings on Application.

LXXIX. If the Commissioners shall think fit to entertain such Application, they shall cause all such Inquiries to be made, and take all such other Steps, as shall seem to them expedient for obtaining Information as to the Circumstances; and all the Provisions of the Thirteenth, Fourteenth, Fifteenth, Seventeenth, Eighteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fifth,

and Fifty-first Sections of this Act shall apply to the Case as though an Improvement were to be made of the Lands proposed to be charged.

LXXX. If the Commissioners shall be satisfied that the Railway or Canal, when constructed and open for Traffic, will effect a permanent Increase of the yearly Value of the Lands exceeding the Yearly Amount proposed to be charged thereon, they shall execute and deliver to the Landowner a Provisional Order, under their Seal and the Hands of Two of them, expressing their Sanction of the Charge proposed; and such Order shall be made as near to the Form set forth in the Schedule (A.) to this Act as the Circumstances will permit, and shall, with the Right to a Charge thereby created, be assignable by Endorsement, either absolutely or by way of Security, to any Company or Person that may agree to advance, by paying the same to the Railway or Canal Company, the Amount authorized to be charged, and Notice of such Assignment shall be given to the Commissioners, and shall be registered by them.

Provisional
Order sanc-
tioning
Charge.

LXXXI. Every Company empowered by Act of Parliament to lend Money for the Improvement of Land is hereby empowered to advance, by paying the same to the Railway or Canal Company, any Money authorized to be charged in manner aforesaid.

Companies
empowered
to lend.

LXXXII. When the Railway or Canal shall have been completed and opened throughout for public Traffic, and as many Shares in the Capital of the Railway or Canal Company subscribed for or held as aforesaid by the Landowner as shall be equal in nominal Amount to the Money authorized to be charged shall have been fully paid up, and the Certificates for such Shares shall have been deposited by the Landowner with the Commissioners, the Commissioners shall, by an Absolute Order under their Hands and Seal, execute to the Landowner or his Assignees a Charge upon the Inheritance or Fee of the Lands in question of the Amount authorized as aforesaid to be charged, and may, if the Landowner shall so desire, include, with the Principal Money so charged, the Costs, Charges, and Expenses of the Application and Orders, and of any Advance which may have been made to him of the Amount authorized to be charged, and such settled or taxed Costs and Interest as mentioned in the Fiftieth Section hereof, subject nevertheless to the Proviso in the same Section contained.

Commis-
sioners'
Absolute
Order and
its Condi-
tions.

LXXXIII. Such Absolute Order shall be made in the Form in the Schedule (B.) to this Act annexed, or as near thereto as the Circumstances will permit, and all the

Form and
Effect of
Absolute
Order.

Provisions of this Act relating to Absolute Orders, whether in respect of the Form or Effect of such Charges or Orders or otherwise, except only the Provisions for the Apportionment and Release of such Charges, shall apply to Absolute Orders under the last preceding Section as far as the Circumstances admit.

Notice thereof to be entered in Register of Shareholders.

LXXXIV. The Landowner shall forthwith give notice to the Railway or Canal Company of the Execution of such Absolute Order, and of the Deposit of such Certificates with the Commissioners, and thereupon the Company shall make an Entry or Memorial in their Register of Shareholders with respect to such Shares of the Fact of such Absolute Order having been executed.

Person liable to pay Charge to be entitled for the Time being to the Shares;

LXXXV. From the Time of such Notice, and during the whole Term of the Charge created by such Absolute Order, the Person who for the Time being shall be bound to make the periodical Payments of such Charge shall be entitled to the said Shares, and if the same shall not at the Time being be registered in his Name, the Person registered as the Holder thereof shall, as between himself and the Person so entitled, hold them in trust for such last-mentioned Person.

and to have them stand in his own Name.

LXXXVI. The Person so for the Time being entitled may at any Time require the Person registered as the Holder of the said Shares, or his Representatives, to transfer to him the said Shares, and such Transfer shall thereupon be made accordingly, but at the Expense in all respects of the Transferee; and upon the Production of such Transfer duly stamped, and of a Certificate by the Commissioners under their Hands and Seal that the Transferee is the Person at the Time being bound to make the Periodical Payments of the said Charge, the Railway or Canal Company shall register such Transfer.

Rights and Duties of Persons registered for the Time being in respect of the Shares.

LXXXVII. With the Exception of such Transfers as may from Time to Time be made for the Purpose of transferring the Shares to the Person so for the Time being entitled thereto, the said Shares shall not under any Circumstances be transferred or disposed of by the registered Holder, whether he be the Person for the Time being entitled thereto or not, during the Term of the said Charge; but during the Term of such Charge the registered Holder for the Time being of the said Shares shall have all the other Rights and Powers of a Shareholder in the Railway or Canal Company in respect of the said Shares; and the Railway or Canal Company shall not be bound to see to the Application of any Dividend received by such registered Holder, but as between himself and the Person or Persons for the Time being entitled to

such Shares he shall hold any Dividend which may be received by him in trust for the Person who, at the Time when such Dividend became payable, was the Person entitled to the said Shares.

LXXXVIII. Whenever any Person or those whom he legally represents as their Executor or Administrator shall have been bound to make, and shall have made, such and so many periodical Payments of the Charge as to repay thereby Principal Money which, in proportion to the whole Amount of Principal Money charged and the whole Number of the said Shares, shall correspond to any integral Number of Shares, with or without a Fraction over, it shall be lawful for the Commissioners, on the Application of such Person, made either during the Term of the Charge or within Two Years after its Expiration, to certify that Fact under their Hands and Seal, and by the same Certificate to appropriate to such Person certain specified Shares to such integral Number, and to deliver to him the corresponding Share Certificates; and upon the Production to the Railway or Canal Company of such Certificate by the Commissioners and Share Certificates, it shall be lawful for such Person, if he shall not already be the registered Holder, to require such Shares to be transferred to him, and the Railway or Canal Company shall make an Entry or Memorial on their Register of Shareholders of such Shares being freed from the Provisions of this Act, or of the Term of the Charge having expired, as the Case may be, and such Shares shall thenceforward be held and transferred in the same Manner as any other Shares in the same Company, but if the Term of the Charge shall not have expired, the Three last preceding Sections of this Act shall still apply to the Residue of the Shares to which the same Charge shall relate.

LXXXIX. The Shares composing the said Residue shall at the End of Two Years after the Expiration of the Term of the Charge belong to the Person who shall have been bound to make the last periodical Payment of the Charge, or to his Executors or Administrators, on such Payment being made; and the Commissioners shall deliver to him or them the corresponding Share Certificates, and certify the Title to the Shares under their Hands and Seal in accordance with the above Provision; and upon the Production to the Railway or Canal Company of the Share Certificates and such Certificate by the Commissioners, such Person as aforesaid, or his Executors or Administrators, shall have the said Shares transferred to him or them, so far as he or they shall not be already the

Entire Shares to belong to Parties in proportion to their Payments, and to be released to them from Time to Time.

Shares not claimed within Two Years from Expiration of Term to belong to Person bound to make last Payment of Charge.

registered Holder or Holders thereof; and the Railway or Canal Company shall make an Entry or Memorial on their Register of Shareholders of the Term of the Charge having expired, and thenceforward the said Shares shall be held and transferred in the same Manner as any other Shares in the same Company.

[§ XC. Inclosure Commissioners to cause a Table of Fees to be prepared and submitted to Treasury for Approval.]

[§ XCI. Officers to render Account of Fees received to the Treasury.]

SCHEDULE.

[Contains forms of Orders and Charges under the Act.]

CAP. CXV.

An Act to prohibit the placing of poisoned Flesh and poisonous Matters in Plantations, Fields, and open Places, and to extend 'The Poisoned Grain Prohibition Act, 1863.'—
[29th July 1864.]

WHEREAS it is expedient to extend the Provisions of an Act passed in the Session of Parliament held in the Twenty-sixth and Twenty-seventh Years of the Reign of Her present Majesty, intituled *An Act to prohibit the Sale and Use of Poisoned Grain or Seed*: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Short Title. I. This Act may be cited for all Purposes as 'The Poisoned Flesh Prohibition Act, 1864.'

Penalty
for placing
poisoned
Flesh in
Fields, &c.

II. Every Person who shall knowingly and wilfully set, lay, put, or place, or cause to be set, laid, put, or placed, in or upon any Land any Flesh or Meat which has been mixed with or steeped in or impregnated with Poison or any poisonous Ingredient so as to render such Flesh or Meat poisonous and calculated to destroy Life, shall, upon a summary Conviction thereof, forfeit any Sum not exceeding Ten Pounds, to be recovered in the Manner provided by the Poisoned Grain Prohibition Act, 1863: Provided always, that nothing herein contained shall prevent Owners or Occupiers of Land in *Ireland* from laying or causing to be laid any poisonous Matter as herein-before described, after a Notice has been posted in a conspicuous Place, and Notice in Writing has been given to the nearest Constabulary Station.

Not to

III. Nothing in this Act shall make it unlawful for the

Occupier of any Dwelling House or other Building, or the Owner of any Rick or Stack of Wheat, Barley, Oats, Beans, Peas, Tares, Seeds, or of any cultivated Vegetable Produce, to put or place or cause to be put or placed in any such Dwelling House or other Building, or in any enclosed Garden attached to such Dwelling House, or in the Drains connected with any such Dwelling House, provided that such Drains are so protected with Gratings or otherwise as to prevent any Dog from entering the same, or within such Rick or Stack, any Poison or poisonous Ingredient or Preparation for the Destruction of Rats, Mice, or other small Vermin.

apply to
Occupier
placing
poisoned
Prepara-
tions for
Destruc-
tion of
Vermin.

IV. This Act shall not apply to any Grain, Seed, or Meal within the Provisions of the Poisoned Grain Prohibition Act, 1863, and the Provisions of the Fifth Section of the said Poisoned Grain Prohibition Act, 1863, shall apply to any Proceedings instituted under this Act, and shall come into operation on the First *October* One thousand eight hundred and sixty-four.

As to Ap-
plication
of Act.

CAP. CXVII.

An Act to render permissive the Use of the Metric System of Weights and Measures.—[29th July 1864.]

WHEREAS, for the Promotion and Extension of our internal as well as our foreign Trade, and for the Advancement of Science, it is expedient to legalize the Use of the Metric System of Weights and Measures: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. This Act may be cited as the 'Metric Weights and Measures Act, 1864.'

Short Title.

II. Notwithstanding anything contained in any Act of Parliament to the Contrary, no Contract or Dealing shall be deemed to be invalid or open to Objection on the Ground that the Weights or Measures expressed or referred to in such Contract or Dealing are Weights or Measures of the Metric System, or on the Ground that Decimal Subdivisions of legal Weights and Measures, whether Metric or otherwise, are used in such Contract or Dealing.

Contracts
may be
made in
Terms of
the Metric
System.

III. The Table in the Schedule hereto annexed shall be deemed to set forth, in Terms of the Weights and Measures in force in this Country, the Equivalents of the Weights

Equiva-
lents of
Metric
Weights

and Measures in Terms of Weights and Measures.

and Measures therein expressed in Terms of the Metric System, and such Table may be lawfully used for computing, determining, and expressing, in Weights and Measures, Weights and Measures of the Metric System.

SCHEDULE to which this Act refers.

SCHEDULE of TABLES of the Values of the principal Denominations of Measures and Weights on the Metric System expressed by means of the legalized Denominations of Measures and Weights in Great Britain and Ireland.

MEASURES OF LENGTH.

Metric Denominations and Values.		Equivalents in British Denominations.				
—	Metres.	Miles.	Yards.	Feet.	Inches.	Decimals.
Myriametre . .	10,000	{	6	376	0	11·9
			or	10,936	0	11·9
Kilometre . . .	1000			1093	1	10·79
Hectometre . .	100			109	1	1·079
Dekametre . . .	10			10	2	9·7079
Metre	1			1	0	3·3708
Decimetre . . .	$\frac{1}{10}$					3·9371
Centimetre . . .	$\frac{1}{100}$					0·3937
Millimetre . . .	$\frac{1}{1000}$					0·0394

MEASURES OF SURFACE.

Metric Denominations and Values.		Equivalents in British Denominations.		
—	Square Metres.	Acres.	Square Yards.	Decimals.
Hectare, i.e. 100 Ares .	10,000	{	2	2280·3326
			or	11,960·3326
Dekare, i.e. 10 Ares . .	1000			1196·0333
Are	100			119·6033
Centiare, i.e. $\frac{1}{100}$ Are .	1			1·1960

MEASURES OF CAPACITY.

Metric Denominations and Values.		Equivalents in British Denominations.						
—	Cubic Metres.	Quartars.	Bushels.	Pecks.	Gallons.	Quarts.	Pints.	Decimals.
Kilolitre, i.e. 1000 Litres	1	3	3	2	0	0	0	0.77
Hectolitre, i.e. 100 Litres	$\frac{1}{10}$		2	3	0	0	0	0.077
Dekalitre, i.e. 10 Litres .	$\frac{1}{100}$			1	0	0		1.6077
Litre	$\frac{1}{1000}$							1.76077
Decilitre, i.e. $\frac{1}{10}$ Litre .	$\frac{1}{10000}$							0.176077
Centilitre, i.e. $\frac{1}{100}$ Litre .	$\frac{1}{100000}$							0.0176077

WEIGHTS.

Metric Denominations and Values.		Equivalents in British Denominations.						
—	Grams.	Cwts.	Stones.	Pounds.	Ounces.	Drams.	Decimals.	
Millier . . .	1,000,000	19	5	6	9		15.04	
Quintal . . .	100,000	1	7	10	7		6.304	
Myriagram . .	10,000		1	8	0		11.8304	
Kilogram . . .	1000	{ (or 15432.3487 grains)			2	3	4.3830	
Hectogram . .	100				3		8.4383	
Dekagram . . .	10						5.6438	
Gram	1						0.56438	
Decigram . . .	$\frac{1}{10}$						0.056438	
Centigram . . .	$\frac{1}{100}$						0.0056438	
Milligram . . .	$\frac{1}{1000}$						0.00056438	

CAP. CXVIII.

An Act to amend the Acts relating to Salmon Fisheries in Scotland.—[29th July 1864.]

WHEREAS an Act was passed in the Twentieth-fifth and Twenty-sixth Years of the Reign of Her Majesty Queen Victoria, intituled *An Act to regulate and amend the Law respecting the Salmon Fisheries of Scotland*; and another Act was passed in the Twenty-sixth and Twenty-seventh Years of the Reign of Her Majesty Queen Victoria, intituled *An Act to continue the Powers of the Commissioners under*

25 & 26
Vict. c. 97.

26 & 27
Vict. c. 50.

the Salmon Fisheries (Scotland) Act until the First Day of January One thousand eight hundred and sixty-five, and to amend the said Act: And whereas by the first-recited Act Provision was made for determining by Byelaws certain matters on or before the First Day of *January* One thousand eight hundred and sixty-three, and certain other Matters on or before the First Day of *January* One thousand eight hundred and sixty-four, and for reporting the same to the Secretary of State; and by the second-recited Act the Time for determining and reporting on certain of such Matters was continued till the First Day of *January* One thousand eight hundred and sixty-five; and it is expedient that the Times so limited should be extended, and that the said Two recited Acts should be amended: Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Time for
making
certain
Byelaws
extended.

I. The said Commissioners shall and may, on or before the First Day of *January* One thousand eight hundred and sixty-six, determine the Matters specified and referred to in the Sixth, Fifteenth, and Sixteenth Sections of the first-recited Act, and the First Section of the second-recited Act, respectively, by Byelaws under their Hands or the Hands of any Two of them, in manner prescribed by the first-recited Act, and the whole Enactments and Provisions of the first-recited Act with respect to the Transmission, Publication, and Confirmation of Byelaws shall be applicable to the Byelaws to be made by the said Commissioners during the Period above specified.

Power to
Secretary
of State to
confirm
Byelaws.

II. It shall be lawful for the Home Secretary to confirm any Byelaws made under the Provisions of the recited Acts, notwithstanding the Period therein prescribed for such Confirmation may have elapsed at any Period prior to the First Day of *January* One thousand eight hundred and sixty-five.

In Cases
where Dis-
trict Boards
have not
been con-
stituted
Commis-
sioners, on
Requisi-
tion, may
re-issue a
Byelaw.

III. In any Case where a District Board has not been constituted, under the Provisions of the first-recited Act, previous to the passing of this Act, the Commissioners may, on the Requisition of any Proprietor of Salmon Fisheries within such District, re-issue a Byelaw constituting the District; and the Commissioners, Sheriff, and Sheriff-Clerk shall thereupon take all the Proceedings prescribed by the first-recited Act with respect to the Formation of District Boards; and such Boards, when so formed, shall have all the Powers and Authorities conferred on or competent to any District Board under the recited Acts or either of them.

Provision
where no
District

IV. And whereas by the Sixteenth Section of the first-recited Act it is provided, that previously to making Bye-

laws, the Commissioners shall communicate the same to the District Board, and afford the Board reasonable Opportunity of making any Representation to the Commissioners regarding the same: Be it enacted, That the Commissioners may, in all Cases in which no District Board has been formed, make Byelaws in regard to the whole Matters and Things specified and referred to in the Sixth and Sixteenth Sections of the first-recited Act; and on compliance with the whole other Provisions of the said Sixteenth Section, the Secretary of State may approve, alter, or disapprove of such Byelaws, and the same, as altered or approved of by him, shall be as legal and binding on all concerned as if they had been previously communicated to a District Board.

Board has
been
formed.

V. This Act shall be read and construed along with the recited Acts as if the same formed One Act.

This and
recited
Acts to be
One.

CAP. CXX.

An Act to facilitate in certain Cases the obtaining of further Powers by Railway Companies.—[29th July 1864.]

WHEREAS it is expedient that in certain Cases Railway Companies be enabled to obtain further Powers on complying with the Conditions of a General Act of Parliament, without being obliged to procure in each Case a Special Act:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Preliminary.

I. This Act may be cited as The Railway Companies' Powers Act, 1864.

Short Title.

II. In this Act—

The Term 'Railway' includes Works connected with or for the Purposes of a Railway, and also a Railway authorized to be but not actually constructed:

Inter-
pre-
ta-
tion of
Terms.

The Term 'Railway Bill' means a Bill pending in or intended to be introduced into either House of Parliament, having for its Object or One of its Objects to authorize the making of a Railway:

The Term 'the Companies Clauses Acts' means, so far as the Enactment in which that Term is used relates to *England* or *Ireland*, or to a Certificate to be operative in *England* or *Ireland*, The Companies Clauses Consolidation Act, 1845; and, so far as the same relates to *Scotland*, or to a Certificate to be operative in *Scotland*, The Companies Clauses Consolidation

(Scotland) Act, 1845; together with in each Case The Companies Clauses Act, 1863:

The Term 'the Board of Trade' means the Lords of the Committee for the Time being of Her Majesty's Privy Council appointed for the Consideration of Matters relating to Trade and Foreign Plantations.

Description of Cases within this Act.

Act to apply in Cases therein named.

III. This Act shall take effect and apply in each of the Cases following; namely,

1.—Where a Railway Company are desirous that Authority should be given to themselves and some other Railway Company or Companies to enter into an Agreement with respect to all or any of the Matters following; namely,

The Maintenance and Management of the Railways of the Companies respectively, or of any One or more of them, or of any Part thereof respectively;

The Use and Working of the Railways or Railway, or of any Part thereof, and the Conveyance of Traffic thereon;

The fixing, collecting, and Apportionment of the Tolls, Rates, Charges, Receipts, and Revenues levied, taken, or arising in respect of Traffic;

The joint Ownership, Maintenance, Management, and Use of a Station or other Work; or the separate Ownership, Maintenance, Management, and Use of several Parts of a Station or other Work:

2.—Where a Railway Company are desirous of obtaining an Extension of the Time limited for the Sale by them of superfluous Lands:

3.—Where a Railway Company incorporated by Special Act or by Certificate under The Railways Construction Facilities Act, 1864, are desirous of obtaining Authority to raise additional Capital.

Application for Certificate.

As to Application for Certificate by Company to Board of Trade.

IV. In any such Case the Company, if desirous to obtain a Certificate under this Act, shall proceed as follows; namely,

(1.) They shall apply to the Board of Trade for a Certificate under this Act:

(2.) They shall lodge at the Office of the Board of Trade a Draft of the Certificate as proposed by them:

(3.) They shall publish Notice of the Application according to the General Rules under this Act.

Said Board to inquire if Requirements have

V. As soon as conveniently may be after the Time for Completion of the required Notice, the Board of Trade shall proceed to inquire whether the Company have com-

plied with the Requirements of the General Rules respecting Notice.

been complied with ;

VI. The Board of Trade, before settling a Draft of a Certificate, shall take into consideration any Representation made to them, and shall duly inquire into the Merits of any Objection brought before them, respecting the Application.

and to consider all Representations and Objections.

Opposition of Railway or Canal Company to Application.

VII. If in any Case any Railway or Canal Company desire to be heard by Counsel, Agents, and Witnesses against the Application of the Promoters, and (within such Time as is prescribed by General Rules under this Act) lodge at the Office of the Board of Trade a Notice in Writing to that Effect (herein-after referred to as a Notice of Opposition) in the Form set forth in the Schedule to this Act (with such Variations as Circumstances require), in that Case the Board of Trade, if the Railway or Canal Company lodging the Notice would be affected in any way by the proposed Certificate, shall not proceed on the Application of the Promoters.

On Railway or Canal Company affected giving Notice of Opposition Proceedings before Board of Trade to cease.

VIII. Where the Board of Trade do not proceed on the Application they shall, not later in any Year than the Fifteenth Day of *February*, if Parliament is then sitting, and if not, then within Seven Days after the next Meeting of Parliament, lay before both Houses of Parliament a Copy of the Draft Certificate lodged by the Promoters and of the Notice of Opposition ; and the Promoters shall be at liberty to seek by way of Bill in the same Session, in such Manner and on such Conditions as the Houses of Parliament respectively by Standing Order or otherwise from Time to Time direct, such Powers as were sought by them by way of Certificate.

Further Proceedings to be in Parliament.

Settlement of Draft Certificate.

IX. Where the Board of Trade proceed on the Application, then, on being satisfied that the Company have complied with the Requirements of the General Rules respecting Notice, they may, if they think fit, settle a Draft of a Certificate, certifying to the Effect following ; namely,

Power to Board of Trade to settle Certificate according to Nature of Application as herein named.

In the first-mentioned Case, that the Companies in the Certificate specified are authorized to agree among themselves with respect to all or any of the Matters aforesaid in the Certificate specified ;

In the secondly-mentioned Case, that the Time limited for the Sale by the Company of superfluous Lands is extended as in the Certificate specified ;

In the thirdly-mentioned Case, that the Company are

authorized to raise, as Capital, for the Purposes of the Certificate, such additional Sum of Money as therein limited, by the Issue of new Shares or new Stock, either Ordinary or Preference, or partly Ordinary and partly Preference, or partly in that Mode and partly by borrowing on Mortgage, at the Option of the Company, or as may be prescribed in the Certificate, and with power to create and issue Debenture Stock.

Insertion of
Conditions
in Certifi-
cate.

X. The Board of Trade may (subject to the Provisions of this Act, and having regard to the Provisions of any Special Act relating to any Company empowered by a Certificate) insert in the Certificate such Provisions as they, according to the Circumstances of the Case, deem necessary or proper for better effectuating the Purposes of the Certificate, and the same shall be deemed to all Intents Part of the Certificate.

Form of
Certificate.

XI. The Certificate may be in the Form set forth in the Schedule to this Act, with such Provisions as aforesaid.

Submission of Draft Certificate to Houses of Parliament.

Draft Cer-
tificate to
be laid be-
fore Houses
of Parlia-
ment.

XII. The Board of Trade shall lay the Draft Certificate settled by them before both Houses of Parliament within Seven Days after the same is settled, if Parliament is then sitting, or if not, then within Seven Days after the next Meeting of Parliament, but not later in any Year than the First Day of June.

Notice
thereof to
be given.

XIII. On the Draft Certificate being settled the Promoters shall give Notice thereof according to General Rules under this Act.

If either
House re-
solve that
Certificate
ought not
to be made,
it shall not
be pro-
ceeded
with.

XIV. If either House of Parliament within Six Weeks after the Draft of a Certificate settled by the Board of Trade is laid before that House resolves that the Certificate ought not to be made, the same shall not be further proceeded with.

Issue and Publication of Certificate.

If neither
House
resolve that
Certificate
ought not
to be made,
Board of
Trade may
issue the
same.

XV. If neither House of Parliament within the Period aforesaid thinks fit to resolve that the Certificate ought not to be made, then as soon as the Period of Six Weeks after the laying of the Draft Certificate before both Houses of Parliament has expired the Board of Trade may make and issue a Certificate in conformity with such Draft.

XVI. The Certificate shall be published as follows; namely,

Publica-
tion of
Certificate
in Gazette.

Where One Company only is thereby empowered, then in the *London, Edinburgh, or Dublin Gazette*, according as the Head Office of the Company is situate in *England, Scotland, or Ireland* :

Where Two or more Companies are thereby empowered, then in One or more of the Gazettes, according as the several Head Offices of the Companies respectively are situate in *England, Scotland, and Ireland* respectively.

Effect of Certificate.

XVII. As from the Time (not being prior to such Publication) in the Certificate prescribed, and if none is prescribed then as from the Time of such Publication, the Certificate shall have the same Force and Operation, and shall be as absolutely valid and conclusive to all Intents, as if the Contents thereof (taken in conjunction with this Act) had been expressly enacted by Parliament; and the Validity of the Certificate shall not be impeached on account of any alleged Informality in any Court or elsewhere.

Operation of Certificate as Special Act.

XVIII. The Certificate shall be judicially noticed without being specially pleaded.

Judicial Notice of Certificate. Interpretation of Certificate.

XIX. Terms used in the Certificate shall have the same Meanings as they have when used in this Act.

XX. There shall be incorporated with the Certificate (which shall for this Purpose be deemed the Special Act)—

Parts of 26 & 27 Vict. cc. 92 & 118, incorporated.

In the first-mentioned Case, Part III. of The Railways

Clauses Act, 1863;

In the thirdly-mentioned Case, the Companies Clauses Acts.

XXI. In the first-mentioned Case, during the Continuance of any Agreement for the joint working of any Two Railways, in the Calculation of Tolls and Charges for short Distances in respect of Traffic conveyed on both Railways, the Distances traversed shall be reckoned continuously on such Railways as if they were One Railway.

Rule as to short Distances.

XXII. It shall not be lawful for any Company empowered by a Certificate under this Act to issue any Share created under the Authority of the Certificate, nor shall any such Share vest in the Person accepting the same, unless and until a Sum not being less than One Fifth Part of the Amount of such Share is paid up in respect thereof.

Restriction as to Issue of Shares.

XXIII. In the thirdly-mentioned Case the Company, whether incorporated by Special Act or by Certificate, shall be subject to the following Restrictions; namely,

Restrictions on Company as to borrowing, etc.

- (1.) They shall not exercise any Power of borrowing Money under the Certificate until the whole of the Share Capital authorized by the Certificate is subscribed for or taken, and until One Half thereof is actually paid up, and until they prove to the Justice who is to certify under Section 40 of The Com-

- panies Clauses Consolidation Act, 1845, or (in *Scotland*) to the Sheriff who is to certify under Section 42 of The Companies Clauses Consolidation (*Scotland*) Act, 1845, as the Case may be, before he so certifies, that Shares for the whole of the Capital are issued and accepted, and that not less than One Fifth Part of the Amount of each separate Share has been paid up on account thereof before or at the Time of the Issue or Acceptance thereof, and that all such Shares are taken in good Faith, and are held by the Subscribers or their Assigns, those Subscribers or their Assigns being legally liable for the same (of which Matters the Certificate of the Justice or Sheriff shall be sufficient Evidence):
- (2.) They shall not borrow a larger Sum in the whole than One Third of the Amount of the Share Capital authorized by the Certificate :
 - (3.) They shall not, out of Money raised under the Certificate by Calls or borrowing, pay Interest or Dividend to a Shareholder on the Amount of Calls made on his Shares, whether created under the Certificate or otherwise (but this Provision shall not prevent them paying to a Shareholder under the Certificate such Interest on Money advanced by him beyond the Amount of Calls actually made as is allowed by the Companies Clauses Acts) :
 - (4.) They shall not, out of Money so raised, pay or deposit any Money that may be required to be paid or deposited in relation to any Application to Parliament or the Board of Trade :
 - (5.) They shall apply every Part of the Money so raised only for the Purposes for which it is by the Certificate authorized to be applied.

Miscellaneous.

Power to
Board of
Trade to
reject Ap-
plication.

XXIV. Nothing in this Act shall make it obligatory on the Board of Trade to settle a Draft of a Certificate in any Case if it appears to the Board of Trade for any Reason that the Application for a Certificate should not be complied with.

Nothing to
exempt
Railways
from Ope-
ration of
General
Acts.

XXV. Nothing in the Certificate shall exempt any Railway to which it relates, or the Company to whom that Railway belongs, from the Provisions of any General Act of Parliament relating to Railways, or to the better Audit of the Accounts of Railway Companies, passed before or after the issuing of the Certificate, or from any Revision and Alteration, under the Authority of Parliament, of the maximum Tolls and Charges allowed to be taken in respect of that Railway.

XXVI. A Certificate may be made under this Act and The Railways Construction Facilities Act, 1864, jointly, and in any such Case the Forms of Certificate given in this Act and the said Act may be adapted to the Circumstances of the Case.

Certificate under this and Railways Construction Act.

XXVII. Where, in case the Company were proceeding by a Railway Bill instead of under this Act, the Approval of the Bill in any Manner by the Members of the Company would be required under the Standing Orders of either House of Parliament for the Time being in force, the Board of Trade shall not issue a Certificate without being satisfied that the Members of the Company have in like Manner approved of the Application to the Board of Trade.

Approval by Members of Company required, as under Standing Orders.

XXVIII. Subject and according to the Restrictions and Provisions of this Act, the Board of Trade, on the Application of the Company, may from Time to Time amend, extend, or vary by Certificate any Certificate issued under this Act, and may by Certificate revoke a previous Certificate issued under this Act.

Power for Board of Trade to amend or revoke Certificate.

XXIX. If in any Case it is made to appear to the Board of Trade that any Error has been committed in a Certificate or in relation thereto, the Board of Trade may, subject and according to the Restrictions and Provisions of this Act, on the Application of the Company, Body, or Person affected by the Error, and on Notice to the Company or Companies empowered by the Certificate, correct the Error by a further Certificate.

Power to correct Error.

XXX. A Copy of the *London* or *Edinburgh* or *Dublin* Gazette containing a Certificate or a Copy of a Certificate, purporting to be printed by the Printers of the *London*, *Edinburgh*, or *Dublin* Gazette, shall be conclusive Evidence of the Certificate and of the due Publication thereof, without any Proof of the Gazette or without any Proof of the Copy having been in fact so printed, as the Case may be.

Proof of Certificate.

XXXI. Every Company empowered by a Certificate shall at all Times keep at their Head Office Copies of the Certificate printed by the Printers of the Gazette or One of the Gazettes in which the same was published in such Form as General Rules direct, to be sold to all Persons desiring to buy the same at a Price not exceeding One Shilling for each Copy.

Copies of Certificate for Sale.

If any Company fail to comply with this Provision they shall be liable to a Penalty not exceeding Twenty Pounds, and to a further Penalty not exceeding Five Pounds for every Day during which such Failure continues after the First Penalty is incurred.

Applica-
tion of Act
to Proprie-
tors of
Railways
generally.

Recovery
and Appli-
cation of
Penalties.

Custody of
Docu-
ments. 7
W. 4, & 1
Vict. c. 83.

General
Rules in
Schedule,
with Power
for Amend-
ment.

Annual
Report to
Parliament
by Board of
Trade.

XXXII. The Provisions of this Act relative to the first-mentioned Case and to the secondly-mentioned Case respectively shall extend and apply, *mutatis mutandis*, to the Proprietors of a Railway although not incorporated as a Company.

XXXIII. Penalties under this Act or under a Certificate, the Recovery and Application whereof are not otherwise provided for, shall be recovered and applied as Penalties under The Railways Clauses Consolidation Act, 1845, and The Railways Clauses Consolidation (Scotland) Act, 1845, as the Case may require, are recoverable and applicable.

XXXIV. The Act of the Session of the Seventh Year of King William the Fourth and the First Year of Her Majesty (Chapter Eighty-three), 'to compel Clerks of the Peace and other Persons to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament,' shall apply to Documents required to be deposited by General Rules under this Act.

XXXV. The General Rules under this Act shall in the first instance be those set forth in the Schedule to this Act; and the Board of Trade may from Time to Time, for the better Execution of this Act, make General Rules adding to, altering, or revoking any General Rules for the Time being in force under this Act; but any General Rules so made by the Board of Trade shall not have effect unless and until they are laid before both Houses of Parliament; and if either House of Parliament, within Six Weeks after the same are laid before that House, thinks fit to resolve that the same or any Part thereof ought not to take effect, the same or that Part thereof (as the Case may be) shall not take effect; otherwise all Rules made by the Board of Trade under the present Section shall be of the same Force and Effect as if they had been comprised in the Schedule to this Act.

All General Rules which are to take effect under the present Section shall be published in the *London, Edinburgh, and Dublin Gazettes*.

XXXVI. Not later than the First Day of July in each Year the Board of Trade shall lay before both Houses of Parliament a Report respecting the Applications to and Proceedings of the Board of Trade under this Act during the Year then last past.

The SCHEDULE referred to in the foregoing Act.

(i.)—*Notice of Opposition.*

In the Matter of
The Railway Companies' Powers Act, 1864,
and

The Application of the _____ Railway Company for a
Certificate the Draft whereof is intituled [*set out Title*].

We, the _____ Railway [*or Canal*] Company, hereby
declare and give Notice that we desire to be heard by Counsel,
Agents, and Witnesses against the granting to the above-named
Railway Company of the Powers sought to be obtained by them by
the above-mentioned Application.

Dated this _____ Day of _____ 18 ____ .
Witness, A.B.

(L. S.)

(ii.)—*Form of Certificate of Board of Trade.*

The _____ Railway Company.
Certificate of the Board of Trade for the Extension of
Time for Sale of superfluous Lands [*or as the Case
may be*].

Whereas the _____ Railway Company have
complied with the Requirements of The Railway Companies' Powers
Act, 1864 :

Now, therefore, the Board of Trade do, by this their Certificate,
in pursuance of the said Act, and by virtue and in exercise of the
Powers thereby in them vested, and of every other Power enabling
them in this Behalf, certify as follows :

[*Here are to follow the Provisions of the Certificate showing the
Powers conferred and the Terms and Conditions (if any) imposed.*]

(Signed) C. D.

The Board of Trade, _____ Secretary to the Board of Trade.
Whitehall.

Dated this _____ Day of _____

(iii.)—*General Rules.*

Form of Application.

1. The Application to the Board of Trade for a Certificate is to
be made by a Memorial in Writing under the Common Seal of the
Company, lodged at the Office of the Board of Trade.

2. Together with the Memorial the Company are to lodge a
printed Draft of the Certificate as proposed by the Company.

Advertisements as to Application.

3. Notice of the Application to the Board of Trade is to be given
by Advertisement published as follows ; namely,

In every Case, once in each of Three successive Weeks in some One and the same Newspaper of the County, City, or Town, or County of a City or Town, wherein the Head Office of the Promoters is situate :

In the Case referred to in the foregoing Act as the first-mentioned Case, once in each of Three successive Weeks in some One and the same Newspaper of each County, City, or Town, or County of a City or Town, wherein the Head Office of any Railway Company with whom the Promoters propose to enter into an Agreement is situate :

If in any Case there is not any such Newspaper as herein-before described, then in like Manner in a Newspaper of some adjoining or neighbouring County :

In every Case where One Company only is proposed to be empowered, then in the London, Edinburgh, or Dublin Gazette, according as the Head Office of the Company is situate in England, Scotland, or Ireland :

In every Case where Two or more Companies are proposed to be empowered, then in One or more of the Gazettes, according as the several Head Offices of the Company respectively are situate in England, Scotland, and Ireland respectively.

4. The Advertisements are to be published either in the Month of June or in the Month of November, and not at any other Time.

5. Each Advertisement is to give the Address of an Office in London where Copies of the Draft Certificate will be supplied as herein-after directed.

6. Each Advertisement is to state that all Persons desirous of making to the Board of Trade any Representation, or of bringing before them any Objection, respecting the Application, may do so by Letter addressed to the Secretary of the Board of Trade on or before the First Day of August or First Day of January next succeeding the Date of the Advertisement, according as the same is published in the Month of June or in the Month of November.

7. Within One Week after the Publication of the latest Advertisement a Copy of each of the Newspapers and Gazettes containing the several Advertisements is to be lodged at the Office of the Board of Trade.

Notice to Landowners.

8. In the Case referred to in the foregoing Act as the secondly-mentioned Case the Promoters, in the Month of June or in the Month of November (as the Case may be) in which the Advertisements are published, are to serve Notice of the Application on the Owners of Lands adjoining to the Lands to which the Application relates.

Notice of Opposition.

9. Notice of Opposition by a Railway or Canal Company is to be lodged at the Office of the Board of Trade, not later than the First

Day of August or First Day of January next succeeding the Date of the Advertisement of Application, according as the same is published in the Month of June or in the Month of November.

Notice of Settlement of Draft Certificate.

10. On the Draft Certificate being settled by the Board of Trade the Promoters are to serve a Copy thereof, with a Notice that the Draft has been settled by the Board of Trade, on every Company, Body, or Person by whom any Representation or Objection respecting the Application was made to or brought before the Board of Trade, and are also to give by Advertisement or otherwise such public or other Notice (if any) thereof as according to the Circumstances of the Case the Board of Trade direct.

Supply of Copies of Draft Certificate.

11. From the Time of the Publication of the First Advertisement the Promoters are to keep in the Office mentioned in this Behalf in the Advertisement a sufficient Number of Copies of the Draft of the Certificate as proposed by them, and are to furnish there Copies to all Persons applying for them at the Price of not more than Sixpence each.

12. From the Time of the Settlement of the Draft Certificate by the Board of Trade the Promoters are to keep in the Office aforesaid Copies of the Draft supplied to them for that Purpose by the Board of Trade, and are to furnish there Copies thereof to all Persons applying for them at such Price (if any) as the Board of Trade from Time to Time direct.

Printing of Certificate.

13. Copies of the Certificate printed by the Printers of a Gazette are to be printed on ordinary White Folio Paper, similar in Size to the Paper on which the Public General Acts of Parliament are printed for public Sale.

CAP. CXXI.

An Act to facilitate in certain Cases the obtaining of Powers for the Construction of Railways.—[29th July 1864.]

WHEREAS it is expedient to facilitate the making of Branch and other Lines of Railway, and Deviations of existing Railways, and of Railways in course of Construction, and also the Execution of new Works connected with or for the Purposes of existing Railways:

And whereas the Object aforesaid would be promoted if, where all Landowners and other Parties beneficially inter-

ested are consenting to the making of a Railway or the Execution of a Work, the Persons desirous of making or executing the same were enabled to obtain Power to do so, on complying with the Conditions of a General Act of Parliament, without being obliged to procure a Special Act :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows :

Preliminary.

Short
Title.

I. This Act may be cited as The Railways Construction Facilities Act, 1864.

Interpreta-
tion of
Terms.

II. In this Act—

The Term 'Lands' includes any Estate, Right, or Interest in Lands :

The Term 'the Promoters' means in each Case the Company or Persons intending to apply to the Board of Trade for such a Certificate as is herein-after provided for, and, after the Application is made, the Company or Persons actually making the Application, as the Case may require :

The Term 'the Railway' means in each Case the Railway and Works intended by the Promoters before the issuing of the Certificate, and, after the issuing thereof, the Railway and Works therein comprised, as the Case may require :

The Term 'the Lands Clauses Acts' means, so far as the Enactment in which that Term is used relates to *England*, or to a Certificate to be operative in *England*, The Lands Clauses Consolidation Act, 1845 ; and, so far as the same relates to *Scotland*, or to a Certificate to be operative in *Scotland*, The Lands Clauses Consolidation (*Scotland*) Act, 1845 ; together with, in each Case, The Lands Clauses Consolidation Acts Amendment Act, 1860 ; and so far as the same relates to *Ireland*, or to a Certificate to be operative in *Ireland*, The Railways Act (*Ireland*), 1851, together with Acts incorporated in or amending that Act :

The Term 'the Companies Clauses Acts' means, so far as the Enactment in which that Term is used relates to *England* or *Ireland*, or to a Certificate to be operative in *England* or *Ireland*, The Companies Clauses Consolidation Act, 1845 ; and, so far as the same relates to *Scotland*, or to a Certificate to be operative in *Scotland*, The Companies Clauses

Consolidation (*Scotland*) Act, 1845 ; together with, in each Case, The Companies Clauses Act, 1863 : The Term 'the Railways Clauses Acts' means, so far as the Enactment in which that Term is used relates to *England* or *Ireland*, or to a Certificate to be operative in *England* or *Ireland*, The Railways Clauses Consolidation Act, 1845 ; and, so far as the same relates to *Scotland*, or to a Certificate to be operative in *Scotland*, The Railways Clauses Consolidation (*Scotland*) Act, 1845 ; together with, in each Case, The Railways Clauses Act, 1863 :

The Term 'Railway Bill' means a Bill pending in or intended to be introduced into either House of Parliament, having for its Object or one of its Objects to authorize the making of a Railway :

The Term 'the Board of Trade' means the Lords of the Committee for the Time being of Her Majesty's Privy Council appointed for the Consideration of Matters relating to Trade and Foreign Plantations.

Contracts for Lands.

III. Where Promoters of a Railway intend to apply, under this Act, for Authority to make the Railway, they and all Parties seized or possessed of or entitled to Lands required for the Railway shall, in order to the Purchase or taking and Sale of those Lands for the Railway, have all such Powers and Capacities as, in order to the Purchase or taking and Sale of Lands required for an Undertaking authorized by a Special Act of Parliament, are conferred by the Lands Clauses Acts on the Promoters of the Undertaking so authorized and on Parties seized or possessed of or entitled to Lands, or any Estate, Right, or Interest in Lands, required for that Undertaking ; all which Powers and Capacities shall be enjoyed and may be exercised by the Promoters, and by all such Parties as aforesaid, as fully and effectually in all respects as if the Promoters had obtained a Special Act incorporating the Lands Clauses Acts, and authorizing them to make the Railway, and to purchase or take the Lands required for the same ; subject, nevertheless, to the following Restrictions and Provisions ; namely,

- (1.) Nothing herein shall confer on the Promoters and Parties aforesaid any of the Powers or Capacities conferred by the Part of the Lands Clauses Acts with respect to the Purchase and taking of Lands otherwise than by Agreement, or by the Part of those Acts with respect to the Entry upon Lands

Power for Promoters of Railway and all Persons interested in Land to enter into Provisional Contracts for Land required.

by the Promoters of the Undertaking, or by such Provisions of those Acts as provide for the Determination or Ascertainment of the Amount of any Purchase or Compensation Money, or the Settlement of any Apportionment or other Matter, otherwise than by Agreement (except only as to such of those Provisions as provide for the Determination of the Amount of Compensation to be paid for Enfranchisement of Copyholds; and for the Purposes of the present Section, Section 96 of The Lands Clauses Consolidation Act, 1845, relating to the Enfranchisement of Copyholds, shall be read and have effect as if the Limitation of Time therein contained were omitted therefrom):

- (2.) Any Party under Disability or Incapacity, and not having Power to sell and convey or release any Lands, except under the Lands Clauses Acts, as applied by the present Section, shall have Capacity only to contract with the Promoters for the Sale of those Lands, and shall not (before such a Certificate of the Board of Trade, as is herein-after provided for, comes into operation) have Capacity, further or otherwise than if this Act had not been passed, to carry the Contract into execution, or in pursuance thereof to convey or deliver Possession of or release those Lands:
- (3.) The Promoters (before such a Certificate as aforesaid comes into operation) shall be empowered by this Act only to contract for Lands, and they shall not have Capacity, further or otherwise than if this Act had not been passed, to take or hold Lands.

Contracts
for Sale of
Lands be-
longing to
the Crown
or Duchy
of Lancas-
ter or Corn-
wall.

IV. Where Lands required for the Railway belong to or are enjoyed by Her Majesty the Queen, Her Heirs or Successors, in right of the Crown, or form Part of the Possessions of the Duchy of *Lancaster* or of the Duchy of *Cornwall*, any Contract for the Purposes of this Act may be entered into in respect of those Lands, as follows; namely,

In the first-mentioned Case, by the Commissioners of Her Majesty's Woods, Forests, and Land Revenues, or One of them, with the Consent of the Commissioners of Her Majesty's Treasury;

In the secondly-mentioned Case, by the Chancellor of the Duchy by Writing under his Hand attested by the Clerk of the Council of the Duchy;

In the thirdly-mentioned Case, by the Duke of *Cornwall* or other the Persons for the Time being em-

powered to dispose for any Purpose of Lands of the Duchy.

V. Notwithstanding anything in this Act, it shall not be necessary for the Promoters, before applying under this Act for Authority to make the Railway, to enter into any Contract with respect to any Part of a Turnpike Road or public Highway intended to be taken or used, or to be diverted or otherwise interfered with, for the Purposes of the Railway; but the Board of Trade, before they settle a Draft of such a Certificate as herein-after provided for, shall be satisfied that due Provision is made for the Interests of the Trustees or other Persons having the Management of every such Road or Highway, and for the Safety and Convenience of the Public in relation thereto.

User of or Interference with Public or Turnpike Roads.

Application for Certificate.

VI. When the Promoters have contracted for the Purchase of all the Lands required for the Railway, and are desirous of obtaining a Certificate under this Act, they shall proceed as follows; namely,

After Land contracted for, Power for Promoters to apply for Certificate, publish Notices, etc.

(1.) They shall apply to the Board of Trade for a Certificate under this Act:

(2.) They shall deposit Maps, Plans, Sections, and Books of Reference, and an Estimate of the Expense of the Construction of the Railway, and lodge a Draft of the Certificate as proposed by them, according to the General Rules under this Act:

(3.) They shall publish Notice of the Application according to such General Rules.

VII. As soon as conveniently may be after the Time for Completion of the required Deposit and Notice the Board of Trade shall proceed to inquire in such Manner and to such Extent as shall appear to them sufficient, whether the Promoters have contracted for the Purchase of all the Lands required for the Railway, and to inquire whether the Promoters have complied with the Requirements of the General Rules respecting Deposit and Notice.

Consideration of Application by Board of Trade.

VIII. The Board of Trade, before settling the Draft of a Certificate, shall take into consideration any Representation made to them, and shall duly inquire into the Merits of any Objection brought before them, respecting the Application.

Board of Trade to consider all Representations and Objections.

Opposition of Railway or Canal Company to Undertaking.

IX. If in any Case any Railway or Canal Company desire to be heard by Counsel, Agents, and Witnesses against the proposed Undertaking, and (within such Time

On Railway or Canal Company

affected
giving
Notice of
Opposition,
Proceed-
ings before
Board of
Trade to
cease.

as is prescribed by General Rules under this Act) lodge at the Office of the Board of Trade a Notice in Writing to that Effect (herein-after referred to as a Notice of Opposition) in the Form set forth in the Schedule to this Act (with such Variations as Circumstances require), in that Case the Board of Trade, if the Railway or Canal Company lodging the Notice would be affected in any way by the proposed Undertaking, shall not proceed on the Application of the Promoters.

Further
Proceed-
ings to be
in Parlia-
ment.

X. Where the Board of Trade do not proceed on the Application, they shall, not later in any Year than the Fifteenth Day of *February*, if Parliament is then sitting, and if not, then within Seven Days after the next Meeting of Parliament, lay before both Houses of Parliament a Copy of the Draft Certificate lodged by the Promoters and of the Notice of Opposition; and the Promoters shall be at liberty to seek by way of Bill in the same Session, in such Manner and on such Conditions as the Houses of Parliament respectively by Standing Order or otherwise from Time to Time direct, such Powers as were sought by them by way of Certificate.

Settlement of Draft Certificate.

Power to
Board of
Trade to
settle Cer-
tificate.

XI. Where the Board of Trade proceed on the Application, then on being satisfied that the Promoters have contracted for the Purchase of all the Lands required for the Railway, and have complied with the Requirements of the General Rules respecting Deposit and Notice, they may, if they think fit, settle a Draft of a Certificate certifying to the Effect that the Company, or Persons therein specified, are authorized to make the Railway therein described.

Insertion
of Condi-
tions in
Certificate.

XII. The Board of Trade may (subject to the Provisions of this Act) insert in the Draft Certificate such Provisions as they, according to the circumstances of the Case, deem necessary or proper for better effectuating the Purposes of the Certificate; and the same shall be deemed to all Intents Part of the Certificate.

Form of
Certificate.

XIII. The Certificate may be in the Form set forth in the Schedule to this Act, with such Provisions as afore-said.

Submission of Draft Certificate to Houses of Parliament.

Draft Cer-
tificate to
be laid
before
Houses of
Parliament.

XIV. The Board of Trade shall lay the Draft Certificate settled by them before both Houses of Parliament, within Seven Days after the same is settled, if Parliament is then sitting, and if not, then within Seven Days after the next

Meeting of Parliament, but not later in any Year than the First day of *June*.

XV. On the Draft Certificate being settled the Promoters shall give Notice thereof according to General Rules under this Act.

Notice thereof to be given.

XVI. If either House of Parliament within Six Weeks after the Draft of a Certificate settled by the Board of Trade is laid before that House, resolves that the Certificate ought not to be made, the same shall not be further proceeded with; and in that Case all Contracts for the Purchase or taking of Lands for the Purposes of the Undertaking shall cease to be binding on either Party.

If either House resolve that Certificate ought not to be made, it shall not be proceeded with.

Issue, Publication, and Effect of Certificate.

XVII. If neither House of Parliament within the Period aforesaid thinks fit to resolve that the Certificate ought not to be made, then as soon as the Period of Six Weeks after the laying of the Draft Certificate before both Houses of Parliament has expired, the Board of Trade may make and issue a Certificate in conformity with such Draft.

If neither House resolve that Certificate ought not to be made, Board of Trade may issue the same.

XVIII. The Certificate shall be published in the *London* or *Edinburgh* or *Dublin* Gazette, respectively, if the Railway will be situate wholly in *England* or *Scotland*, or in *Ireland*; and shall be published both in the *London* and in the *Edinburgh* Gazette, if the Railway will be situate partly in *England* and partly in *Scotland*.

Publication of Certificate in Gazette.

XIX. As from the Time (not being prior to such Publication) in the Certificate prescribed, and if none is prescribed then as from the Time of such Publication, the Certificate shall have the same Force and Operation, and shall be as absolutely valid and conclusive to all Intents, as if the Contents thereof (taken in conjunction with this Act) had been expressly enacted by Parliament; and the Validity of the Certificate shall not be impeached on account of any alleged Informality in any Court or elsewhere.

Operation of Certificate as Special Act.

XX. The Certificate shall be judicially noticed without being specially pleaded.

Judicial Notice of Certificate.

XXI. Terms used in the Certificate shall have the same Meanings as they have when used in this Act.

Interpretation of Certificate.

Duration of Powers under Certificate.

XXII. If the Company, or Persons by the Certificate empowered to make the Railway, do not within Five Years from the Commencement of the Operation of the Certificate, or within any shorter Period prescribed therein, complete the Railway and open it for public Traffic, then (subject to any Provisions and Qualifications in the Certi-

Cesser of Powers at Expiration of prescribed Time.

ificate contained) all the Powers and Authorities given by the Certificate shall, from and after the Expiration of the Time aforesaid, cease, except as to so much of the Railway as is then completed.

Lands.

Incorporation of Lands Clauses Acts in Certificate, except Provisions giving compulsory Powers, etc.

XXIII. The Lands Clauses Acts shall be incorporated with the Certificate (which shall for this Purpose be deemed the Special Act) except as may be therein excepted, and except as to the following Provisions; namely,

- (1.) With respect to the Purchase and taking of Lands otherwise than by Agreement:
- (2.) With respect to the Entry upon Lands by the Promoters of the Undertaking:
- (3.) So much of those Acts as provides for the Determination or Ascertainment of the Amount of any Purchase or Compensation Money, or the Settlement of any Apportionment or other Matter, otherwise than by Agreement (but excluding from this Exception so much of those Acts as provides for the Determination of the Amount of Compensation to be paid for Enfranchisement of Copyholds).

Incorporation of Company.

In what Cases Company shall be incorporated.

XXIV. Where the Promoters are not a Company incorporated (by Special Act, or by previous Certificate under this Act), and are Seven or more in Number, a Company shall be incorporated by the Certificate, for the Purposes thereof.

In others Company may be incorporated.

XXV. Where the Promoters are not a Company incorporated by Special Act, or by previous Certificate under this Act, and are less than Seven in Number, a Company may be incorporated by the Certificate for the Purposes thereof, if the Promoters so desire.

Power for Board of Trade to incorporate Company by Certificate.

XXVI. Where the Certificate incorporates a Company, it shall contain proper Provisions with apt Terms for creating a Body Corporate, by an appropriate Name, with perpetual Succession and a Common Seal, and with Power to take, hold, and dispose of Lands and other Property, for the Purposes and subject to the Restrictions of the Certificate, and may confer on the Company Power to borrow on Mortgage, and all other usual or proper Powers.

Incorporation of Companies Clauses Acts.

XXVII. In every such Case, the Companies Clauses Acts shall be incorporated with the Certificate (which shall be deemed the Special Act).

Restriction as to Issue of Shares.

XXVIII. It shall not be lawful for any Company empowered by a Certificate under this Act to issue any Share created under the Authority of the Certificate, nor shall

any such Share vest in the Person accepting the same, unless and until a Sum not being less than One Fifth Part of the Amount of such Share is paid up in respect thereof.

XXIX. Every Company, whether incorporated by Special Act or by Certificate, empowered by a Certificate to borrow Money, shall, as regards the Money so authorized to be borrowed, be subject to the following Restrictions; namely,

Restrictions on Company as to borrowing, etc.

- (1.) They shall not exercise the said Powers of borrowing any Money until the whole of the Share Capital authorized by the Certificate is subscribed for or taken, and until One Half thereof is actually paid up, and until they prove to the Justice who is to certify under Section 40. of The Companies Clauses Consolidation Act, 1845, or (in *Scotland*) to the Sheriff who is to certify under Section 42. of The Companies Clauses Consolidation (*Scotland*) Act, 1845, as the Case may be, before he so certifies, that Shares for the whole of the Capital are issued and accepted, and that not less than One Fifth Part of the Amount of each separate Share has been paid up on account thereof before or at the Time of the Issue or Acceptance thereof, and that all such Shares were taken in good Faith, and are held by the Subscribers or their Assigns, those Subscribers or their Assigns being legally liable for the same (of which Matters the Certificate of the Justice or Sheriff shall be sufficient Evidence):
- (2.) They shall not borrow a larger Sum in the whole than One Third of the Amount of the Share Capital authorized by the Certificate:
- (3.) They shall not out of Money raised under the Certificate by Calls or borrowing pay Interest or Dividend to a Shareholder on the Amount of Calls made on his Shares, whether created under the Certificate or otherwise (but this Provision shall not prevent them paying to a Shareholder under the Certificate such Interest on Money advanced by him beyond the Amount of Calls actually made, as is allowed by the Companies Clauses Acts):
- (4.) They shall not out of Money so raised pay or deposit any Money that may be required to be paid or deposited in relation to any Application to Parliament or the Board of Trade:
- (5.) They shall apply every Part of the Money so raised only for Purposes for which it is by the Certificate authorized to be applied.

Contracts
by Pro-
moters
binding on
Company.

XXX. Contracts relative to the Purchase or taking of Lands for the Railway, entered into by the Promoters before the Incorporation of the Company by the Certificate, shall be as binding on the Company as if they had been entered into by the Company.

Construction of Railway.

Incorporation
of
Railways
Clauses
Acts in
Certificate,
except as
to com-
pulsory
Powers,
etc.

XXXI. The Railways Clauses Acts shall be incorporated with the Certificate (which shall be deemed the special Act), except as may be therein excepted, and except as to the following Provisions, namely,—

- (1.) Such of the Provisions with respect to the Construction of the Railway and the Works connected therewith as relate to the Correction of Errors and Omissions in Plans, or to Plans and Sections of Alterations :
 - (2.) With respect to the temporary Occupation of Lands near the Railway during the Construction thereof :
 - (3.) With respect to leasing the Railway :
- And subject to the following Provisions, namely,—

- (1.) Nothing herein shall confer Power for the taking or using of Lands for Deviation or for any other Purpose, otherwise than by Agreement :
- (2.) Any Provision referring to the Datum Line described in the Section approved of by Parliament shall be read as referring to the Datum Line described in the Section approved of by the Board of Trade.

Restriction
on Altera-
tions of
Plan or
Section.

XXXII. Where the Promoters desire to make any Alteration in the deposited Plan or Section, they may do so with the Consent of the Board of Trade ; but the Board of Trade shall not settle a Draft of a Certificate without being satisfied that all Parties interested in Lands liable to be affected by or in consequence of the Alteration consent thereto.

Provision
respecting
Gauge.

XXXIII. Every Railway made under this Act in *England* or *Scotland* shall be made on the Gauge of Four Feet Eight Inches and Half an Inch, unless in any Case the Certificate prescribes the making of the Railway on the Gauge of Seven Feet or on both those Gauges.

Every Railway made under this Act in *Ireland* shall be made on the Gauge of Five Feet Three Inches.

Provisions to secure Completion of Railway.

Promoters
to deposit
Eight per
Cent. on
Estimate in

XXXIV. After the Certificate is ready to be issued, and before the same is issued, by the Board of Trade, the Promoters, unless they are a previously existing Company possessed of a Railway open for public Traffic, shall, within

such Time as General Rules under this Act direct, pay as a Deposit a Sum of Money not less than Eight *per Centum* on the Amount of their Estimate of the Expense of the Construction of the Railway, as follows; namely,—

Court of
Chancery,
etc.

Where the Railway or any Part thereof will be situate in *England*,—into the Bank of *England*, in the Name and with the Privy of the Accountant General of the Court of Chancery in *England*:

Where the Railway will be situate wholly in *Scotland*,—either into the Bank of *England* in manner aforesaid, or (at the Option of the Promoters) into a Bank in *Scotland* established by Act of Parliament or Royal Charter, in the Name and with the Privy of the Queen's Remembrancer of the Court of Exchequer in *Scotland*:

Where the Railway will be situate in *Ireland*,—into the Bank of *Ireland*, in the Name and with the Privy of the Accountant General of the Court of Chancery in *Ireland*.

XXXV. The Board of Trade may issue their Warrant to the Promoters for such Payment into Court, which Warrant shall be a sufficient Authority for the Persons therein named, or the Majority or Survivors of them, to pay the Money therein mentioned into the Bank therein mentioned, in the Name and with the Privy of the Officer therein mentioned, and for that Officer to receive the same, to be placed to his Account there, *ex parte* the Railway therein mentioned, according to the Method (prescribed by Statute, or General Rules or Orders of Court, or otherwise) for the Time being in force respecting the Payment of Money into the said Courts respectively, and without Fee or reward.

Warrant
of Board of
Trade for
Payment
into Court.

XXXVI. Provided, that in lieu, wholly or in part, of the Payment of Money, the Promoters may bring into Court as a Deposit an equivalent Sum of Bank Annuities, or of any Stocks, Funds, or Securities on which Cash under the Control of the respective Court is for the Time being permitted to be invested, or of Exchequer Bills (the Value thereof being taken at the Price at which the Promoters originally purchased the same, as appearing by the Broker's Certificate of that Purchase); and in that Case the Board of Trade shall vary their Warrant accordingly.

Liberty for
Promoters
to bring in
Exchequer
Bills, etc.

XXXVII. At any Time when the Office of the Accountant General of the Court of Chancery in *England* or *Ireland* is closed, a Deposit under this Act may nevertheless be made, in such Manner as General Orders of the respective Courts authorize and direct.

Provision
for Vacations
in
Offices of
Courts.

XXXVIII. Where Money is so paid into the Court of

Power for

Court to
direct In-
vestment.

Chancery in *England* or *Ireland*, the Court may, on the Application of the Persons named in the Warrant of the Board of Trade, or of the Majority or Survivors of them, order that the same be invested in such Stocks, Funds, or Securities as the Applicants desire and the Court thinks fit.

Interpreta-
tion of
'Deposit
Fund' and
'Depositors' in fol-
lowing
Provisions.

XXXIX. In the subsequent Provisions of this Act, the Term 'the Deposit Fund' means the Money deposited, or the Stocks, Funds, or Securities in which the same is invested, or the Bank Annuities, Stocks, Funds, Securities, or Exchequer Bills deposited, as the Case may be; and the Term 'the Depositors' means the Persons named in the Warrant of the Board of Trade authorizing the Deposit, or the Majority or Survivors of those Persons, their Executors, Administrators, or Assigns.

Repayment
of Deposit
on Comple-
tion of
Railway or
on Terms.

XL. The Court in which the Deposit is made shall, on the Application of the Depositors, order the Deposit Fund to be paid, transferred, or delivered out to the Applicants, or as they direct, in any of the following Events; namely,—

- (1.) If, within the Time in the Certificate prescribed, and if none is prescribed, then within Five Years from the Commencement of the Operation of the Certificate, the Company, or Persons thereby empowered to make the Railway, complete it and open it for public Traffic; or
- (2.) If, within the same Time, they (being a Company) prove to the Satisfaction of the Board of Trade that One Half of their nominal Capital authorized by the Certificate is paid up, and that they have expended a like Amount for the Purposes of the Certificate; or
- (3.) If, at any Time after the issuing of the Certificate, they execute and deliver to the Solicitor of Her Majesty's Treasury a Bond with a Surety or Sureties (such Bond being prepared to the Satisfaction of, and such Surety or Sureties being approved by, the said Solicitor) in a penal Sum of Twice the Amount of the Money required to be deposited, conditioned to the Effect following, namely,—for Payment to Her Majesty, Her Heirs or Successors, of the Amount of the Money required to be deposited, if the Company or Persons empowered by the Certificate do not, within the Time aforesaid, either complete the Railway and open it for public Traffic, or (being a Company) give such Proof as aforesaid respecting their Capital and Expenditure.

Forfeiture
of Deposit
on Non-
completion

XLI. If the Company, or Persons empowered by the Certificate to make the Railway, do not, within the Time in the Certificate prescribed, and if none is prescribed, then

within Five Years from the Commencement of the Operation of the Certificate, do one or other of the following Things, namely,—

of Railway,
etc.

- (1.) Complete the Railway and open it for public Traffic; or
- (2.) Give (being a Company) such Proof as herein-before mentioned respecting their Capital and Expenditure; or
- (3.) Execute and deliver such a Bond as is herein-before described,—

then and in every such Case the Deposit Fund shall, from and after the Expiration of the Time aforesaid, be forfeited to Her Majesty, and shall accordingly be paid, transferred, or delivered out to or for the Account of Her Majesty's Exchequer, in such Manner as the Court in which the Deposit is made thinks fit to order, on the Application of the Solicitor of Her Majesty's Treasury, on Notice to such Parties (if any) as the Court thinks fit; and the Deposit Fund, when so paid, transferred, or delivered, or the Proceeds thereof, shall be carried to and form Part of the Consolidated Fund of the United Kingdom.

XLII. Where any such Bond as aforesaid is given, the Amount recovered thereon shall be paid to the Account of Her Majesty's Exchequer, and shall be carried to and form Part of the said Consolidated Fund.

Applica-
tion of
Money re-
covered on
Bond.

XLIII. The Depositors shall be entitled to receive Payment of the Interest or Dividends from Time to Time accruing on the Deposit Fund while in Court; and the Court in which the Deposit is made may from Time to Time, on the Application of the Depositors, make such Order as seems fit respecting the Payment of the Interest or Dividends accordingly.

Depositors
to receive
Dividends
accruing
while
Fund in
Court.

XLIV. The Certificate of the Board of Trade that such Proof as aforesaid respecting the Capital and Expenditure of any Company has been given to the Satisfaction of the Board of Trade, and the Certificate of the Solicitor of Her Majesty's Treasury that such Bond as aforesaid has in any Case been prepared, executed, and delivered to his Satisfaction, shall respectively be sufficient Evidence of the Matters therein certified.

Proof as to
Capital and
Expendi-
ture, Exe-
cution of
Bond, etc.

XLV. The issuing in any Case of any Warrant or Certificate relating to Deposit or to the Deposit Fund, or any Error in any such Warrant or Certificate or in relation thereto, shall not make the Board of Trade, or the Person signing the Warrant or Certificate on their Behalf, in any Manner liable for or in respect of the Deposit Fund, or the Interest of or Dividends on the same, or any Part thereof respectively.

Protection
to Board of
Trade in
case of
Error, etc.

Mode of
Applica-
tion to
Courts.

XLVI. Any Application under this Act to the Court of Chancery in *England* or *Ireland* shall be made in a summary Way in such Manner as General Orders of those Courts respectively direct.

Power for
Courts to
make
General
Orders.

XLVII. The Lord Chancellor of *Great Britain*, with the Advice and Assistance of the Lords Justices of the Court of Appeal in Chancery and the Master of the Rolls and the Vice Chancellors, or any Two of those Judges, and the Lord Chancellor of *Ireland*, with the Advice and Assistance of the Lord Justice of the Court of Appeal in Chancery in *Ireland* and of the Master of the Rolls in *Ireland*, may respectively from Time to Time make such General Orders as seem fit for the Regulation of the Practice under this Act of the Court of Chancery in *England* and *Ireland* respectively.

Penalty on
Company
failing to
open new
Railway in
certain
Cases.

XLVIII. Where a Certificate is obtained by a previously existing Company possessed of a Railway open for public Traffic, then, if the Company fail to complete the Railway and open it for public Traffic within the Time in the Certificate prescribed, and if none is prescribed, then within Five Years from the Commencement of the Operation of the Certificate, the Company shall be liable to a Penalty of not less than Twenty Pounds and not exceeding Fifty Pounds for every Day during which such Failure continues, except only in respect of any Time during which it appears from a Certificate of the Board of Trade that the Company were prevented from completing the Railway or opening it for public Traffic by unforeseen Accident or Circumstances beyond their Control, but the want of sufficient Funds shall not be deemed a Circumstance beyond their Control, within the Meaning of this Provision.

Tolls and Charges for Use of Railway.

Tolls, etc.
in Sched-
ule.

XLIX. The Proprietors of the Railway may demand and take, in respect of the Railway, Tolls and Charges not exceeding the Sums specified in the Schedule to this Act, subject and according to the Regulations therein specified.

Power for
Board of
Trade to
vary Tolls,
etc.

L. The Board of Trade may nevertheless by the Certificate vary the Tolls and Charges and Regulations specified in the Schedule to this Act, or any of them, if in any Case it seems to them necessary or proper, under the Circumstances, to do so.

Application of General Railway Acts.

Enact-
ments in
Schedule

LI. The Enactments described in the Schedule to this Act, and any Enactments amending, perpetuating, or

otherwise affecting any of them, so far as the same are in force at the passing of this Act, shall extend and apply, as the Case may require, to the Railway, and to the Company or Persons empowered by the Certificate to make the Railway, and shall in all respects operate in relation thereto respectively, as if they were expressly repeated and re-enacted in this Act, subject, nevertheless, and according to the following Variations and Provisions; namely,—

applied to
the Rail-
way and
Company,
subject to
Variations.

- (1.) For the Purposes and within the Meaning of any of those Enactments, the Railway shall be deemed to be a Railway made and constructed and carried on under the Authority of Parliament and under the Powers and Provisions of an Act of Parliament, and the Certificate (taken in conjunction with this Act) shall be deemed to be a Special Act of Parliament regulating or relating to the Railway, or the Company, Body, or Persons empowered to make the same (as the Case may require):
- (2.) Such of those Enactments as refer to the Time of the passing of an Act of Parliament for the Construction of a Railway, or to the last Day of the Session in which such an Act is passed, shall respectively be read and have effect as referring to the Time of the Commencement of the Operation of the Certificate:
- (3.) The terms 'Company' and 'Railway Company' used in any of those Enactments shall respectively include any Persons empowered by the Certificate to make the Railway:
- (4.) Such of those Enactments as refer to the Directors, or any Director, or the Secretary, Chief or other Clerk, Accountant, Treasurer, or other Officer of a Company, shall extend and apply to every or any One of the Persons (not being a Company) empowered by the Certificate to make the Railway:
- (5.) Such of those Enactments as refer to a Writing under the Common Seal of the Company shall be read and have effect as referring to a Writing under the Hand and Seal of any One of such Persons, as aforesaid:
- (6.) Such of those Enactments as impose any Penalty or Forfeiture, or any pecuniary Liability or any Obligation, on a Company, or give any Right, Remedy, or Process against a Company, shall be read and have effect (so far as the Nature and Circumstances of the Case admit) as imposing a like Penalty, Forfeiture, Liability, or Obligation on, or as giving a like Right, Remedy, or Process against,

every or any One of such Persons, as aforesaid, but not so as to authorize the Recovery of any Penalty or Forfeiture from, or the Enforcement of any Pecuniary Liability against, more than One of such Persons in respect of the same Offence, Matter, or Thing :

- (7.) The Amount of any Compensation to be made to the Owners and Occupiers of any Lands for Loss or Injury or Inconvenience sustained by them respectively by reason of any Works done under the Authority of any of those Enactments shall, in case of Dispute, be settled in Manner directed by the Lands Clauses Acts and the Railways Clauses Acts as respectively applicable to the Case :
- (8.) Such of those Enactments as provide for the Case of the Board of Trade certifying that the Public Safety requires additional Land to be taken by a Company for the Purpose of giving increased Width to the Embankments or Inclination to the Slopes of the Railway, or for making Approaches to Bridges or Archways, or for doing Works for the Repair or Prevention of Accidents or Slips happening or apprehended to the Cuttings, Embankments, or other Works of the Railway, shall be read and have effect, as regards such Portions of Land as are mentioned in any Certificate so given by the Board of Trade, as if compulsory Powers of purchasing and taking Lands had been contained in the Certificate under this Act authorizing the making of the Railway, and the Provisions of the Lands Clauses Acts and the Railways Clauses Acts relative to the compulsory Purchase or taking of Land had been incorporated with that Certificate :
- (9.) If the Railway is in any respect constructed contrary to the Provisions of the Certificate, or of this Act, it shall be deemed to be constructed contrary to the Provisions of any of those Enactments applicable in the Case :
- (10.) Nothing herein shall extend or make applicable, for the Purposes of this Act, to or in any one of the Parts of the United Kingdom, any of those Enactments not in force there independently of this Act.

Miscellaneous.

Board of
Trade may
reject the
Applica-
tion.

LII. Nothing in this Act shall make it obligatory on the Board of Trade to settle a Draft of a Certificate in any Case if it appears to the Board of Trade for any Reason that the Application of the Promoters should not be complied with ;

and in case the Board of Trade reject any Application, all Contracts for the Purchase or taking of Lands for the Purposes of the Undertaking shall cease to be binding on either Party.

LIII. Nothing in the Certificate shall exempt the Railway, or the Company, or Persons to whom it belongs, from the Provisions of any General Act of Parliament relating to Railways, or to the better Audit of the Accounts of Railway Companies, passed before or after the issuing of the Certificate, or from any Revision and Alteration, under the Authority of Parliament, of the maximum Tolls and Charges allowed to be taken under the Certificate.

Saving for General Acts, or Revision of Charges.

LIV. All the Provisions of this Act which relate to the making of a Railway shall extend and apply, *mutatis mutandis*, to the making or executing of any Work connected with or for the Purposes of a Railway (as distinguished from the Construction of a Railway).

New Works in connection with Railway.

LV. Subject and according to the Provisions of this Act, the Board of Trade may, on a joint Application or on Two or more separate Applications, issue a Certificate empowering Two or more Companies, or Persons, respectively, to jointly make or execute the whole, or to separately make or execute Parts, of a Work connected with or for the Purposes of a Railway, and to jointly or separately use the whole or Parts thereof; and all the Provisions of this Act which relate to the making of a Railway, or the making or executing of a Work, shall extend and apply to the making or executing of the whole and the separate Parts of such Work as last aforesaid; and the Form of the Certificate may be adapted to the Circumstances of the Case.

Power to authorize joint Work.

LVI. Where the Certificate is obtained by a previously existing Company incorporated by Special Act or by Certificate, the Certificate may authorize the Company to raise, as Capital, for the Purposes of the Certificate, such additional Sum of Money as therein limited, by the Issue of new Shares or new Stock, either Ordinary or Preference, or partly Ordinary and partly Preference, or partly in that Mode and partly by borrowing on Mortgage, at the Option of the Company, or as may be prescribed in the Certificate, and with Power to create and issue Debenture Stock.

Power to Promoters, being a Company, to raise additional Capital.

In every such Case the Companies Clauses Acts shall be incorporated with the Certificate.

In every such Case the Restrictions by this Act imposed on a Company when originally incorporated by Certificate, with respect to the Exercise of their Borrowing Power and to the Application of Money raised under the Certificate by Calls or borrowing, shall extend and apply to such pre-

viously existing Company in respect of such additional Capital.

Where Promoters are a Company, Approval of Application by a Meeting.

LVII. Where the Certificate is obtained by a previously existing Company incorporated by Special Act or by Certificate, it shall be the Duty of the Board of Trade not to settle a Draft of the Certificate without being satisfied that the Members of the Company have approved of the Application to the Board of Trade, in like Manner as, under the Standing Orders of either House of Parliament for the Time being in force, their Approval of a Railway Bill would be required to be given in the same Case.

Power to Board of Trade to amend or revoke Certificate.

LVIII. Subject and according to the Restrictions and Provisions of this Act, the Board of Trade, on the Application of any Company or Persons empowered by a Certificate, may from Time to Time amend, extend, or vary by Certificate the previous Certificate, and may by Certificate revoke the previous Certificate.

Power to correct Error.

LIX. If in any Case it is made to appear to the Board of Trade that any Error has been committed in a Certificate or in relation thereto, the Board of Trade may, subject and according to the Restrictions and Provisions of this Act, on the Application of any Company, Body, or Person affected by the Error, and on Notice to the Company or Persons empowered by the Certificate, correct the Error by a further Certificate.

Proof of Certificate.

LX. A Copy of the *London, Edinburgh, or Dublin Gazette* containing a Certificate or a Copy of a Certificate, purporting to be printed by the Printers of the *London, Edinburgh, or Dublin Gazette*, shall be conclusive Evidence of the Certificate, and of the due Publication thereof, without any Proof of the Gazette, or without any Proof of the Copy having been in fact so printed, as the Case may be.

Copies of Certificate for Sale.

LXI. The Company or Persons empowered by a Certificate shall at all Times keep at their Head Office Copies of the Certificate printed by the Printers of the Gazette or One of the Gazettes in which the same was published, in such Form as General Rules under this Act direct, to be sold to all Persons desiring to buy the same, at a Price not exceeding One Shilling for each Copy.

If any Company or Persons fail to comply with this Provision they shall be liable to a Penalty not exceeding Twenty Pounds, and to a further Penalty not exceeding Five Pounds for every Day during which such Failure continues after the First Penalty is incurred.

Recovery and Application of Penalties.

LXII. Penalties under this Act or under a Certificate, the Recovery and Application whereof are not otherwise provided for, shall be recovered and applied as Penalties

under the Railways Clauses Acts are recoverable and applicable.

LXIII. The Act of the Session of the Seventh Year of King *William* the Fourth and the First Year of Her Majesty (Chapter Eighty-three), 'to compel Clerks of the Peace and other Persons to take the Custody of such Documents as shall be directed to be deposited with them under the Standing Orders of either House of Parliament,' shall apply to Documents required to be deposited by General Rules under this Act.

As to Custody of Documents under 7 W. 4. & 1 Vict. c. 88.

LXIV. The General Rules under this Act shall in the first instance be those set forth in the Schedule to this Act; and the Board of Trade may from Time to Time, for the better Execution of this Act, make General Rules adding to, altering, or revoking any General Rules for the Time being in force under this Act; but any General Rules so made by the Board of Trade shall not have Effect unless and until they are laid before both Houses of Parliament, and if either House of Parliament, within Six Weeks after the same are laid before that House, thinks fit to resolve that the same or any Part thereof ought not to take Effect, the same or that Part thereof (as the Case may be) shall not take Effect; otherwise all Rules made by the Board of Trade under the present Section shall be of the same Force and Effect as if they had been comprised in the Schedule to this Act.

General Rules in Schedule with Power for Amendment.

All General Rules which are to take Effect under the present Section shall be published in the *London, Edinburgh, and Dublin Gazettes*.

LXV. Not later than the First Day of *July* in each Year the Board of Trade shall lay before both Houses of Parliament a Report respecting the Applications to and Proceedings of the Board of Trade under this Act during the Year then last past.

Annual Report to Parliament by Board of Trade.

The SCHEDULE referred to in the foregoing Act.

(i.) *Notice of Opposition.*

In the matter of

The Railways Construction Facilities Act, 1864,

and

The (proposed)

Railway.

We, the Railway [or Canal] Company hereby declare and give Notice that we desire to be heard by Counsel,

Agents, and Witnesses against the above-mentioned proposed Undertaking.

Dated this Day of , 18 .

Witness, A.B.

L. S.

(ii.) *Form of Certificate of Board of Trade.*

The Railway.

Certificate of the Board of Trade for the Construction of the Railway.

Whereas the Promoters of the Railway have Contracted for the Purchase of the Lands required for the Railway and the Works connected therewith, and have complied with the Requirements of The Railways Construction Facilities Act, 1864 ;

Now, therefore, the Board of Trade do, by this their Certificate, in pursuance of the said Act, and by virtue and in exercise of the Powers thereby in them vested, and of every other Power enabling them in this Behalf, certify as follows :

[*Here are to follow the Provisions of the Certificate showing the Powers conferred and the Terms and Conditions (if any) imposed.*]

The Board of Trade,
Whitehall.

(Signed) C.D.,
Secretary to the Board of Trade.

Dated this Day of .

(iii.) *Tolls and Charges.*

TABLE I.

Maximum Charges for Use of Railway and Supply of Carriages, Waggon, or Trucks.

	For Use of Railway, per Mile.	For Supply of Carriage, Waggon, or Truck by the Proprietors of the Railway, the additional Sum per Mile of
Passengers :—		
For every Person	Twopence.	One Penny.
Animals :—		
For every Horse, Ass, Mule, or other Beast of Draught or Burden (Class 1)	Threepence.	One Penny.
For every Ox, Cow, Bull, or Head of Neat Cattle (Class 2)	Twopence.	One Penny.
For every Calf, Pig, Sheep, Lamb, and other small Animal (Class 3)	Three Farthings.	One Farthing.

TABLE I.—(continued.)

	For Use of Railway, per Mile.	For Supply of Carriage, Waggon, or Truck by the Proprietors of the Railway, the additional Sum per Mile of
Goods (except as provided for in Table IV.):—		
For Cotton and other Wools, Manufactured Goods, Drugs, Fish, and all other Wares, Merchandise, Articles, Matters, or Things not enumerated in any other Class (Class 4) per Ton	Threepence.	One Penny.
For Sugar, Grain, Corn, Flour, Hides, Dyewoods, Earthenware, Timber, Staves, Deals, and Metals (except Iron), Nails, Anvils, Vices, Chains, and Light Iron Castings (Class 5) per Ton	Twopence Halfpenny.	One Penny.
For Coke, Charcoal, Pig Iron, Bar Iron, Rod Iron, Sheet Iron, Hoop Iron, Plates of Iron, Wrought Iron, Heavy Iron Castings, Railway Chains, Slabs, Billets, and Rolled Iron, Lime, Bricks, Tiles, Slates, Salt, Fireclay and Stone (Class 6) per Ton	Three Halfpence.	One Penny.
For Dung, Compost, Manure, undressed Material for Repair of Public Roads or Highways, Coals, Culm, Cinders, Cannel, Ironstone, Iron Ore, Limestone, Clay (except Fireclay), Chalk, Sand, and Slag (Class 7) per Ton	Five Farthings.	One Halfpenny.
For every Carriage of whatever Description conveyed on a Truck or Platform belonging to the Proprietors of the Railway (Class 8):		
If not weighing more than One Ton	Sixpence.	
If weighing more than One Ton, then for the first Ton	Sixpence.	
And for every additional Quarter of a Ton, or fractional Part of a Quarter of a Ton, above the first Ton	Three Halfpence.	

TABLE II.

Maximum Charges for Supply of Locomotive Power.

For the Use of Engines for propelling Carriages on the Railway,
for every Passenger, Animal, and Ton of Goods . . per Mile One Penny.

TABLE III.

Maximum total Charges for Use of Railway and Supply of Carriages, Waggon, or Trucks, and Supply of Locomotive Power, and every other Expense incidental to Conveyance of Passengers, Animals, or Goods along the Railway.

Passengers:—

	Per Mile.
For every Person conveyed in a First-class Carriage	Threepence.
" " Second-class "	Twopence.
" " Third-class "	Five Farthings.

TABLE III.—(continued.)

				Per Mile.
Animals :—				
For every Animal in Class 1	.	.	.	Fourpence.
" Class 2	.	.	.	Threepence.
" Class 3	.	.	.	Three Halfpence.
Goods :—				
For every thing in Class 4	.	.	per Ton	Fourpence.
" Class 5	.	.	per Ton	Threepence.
" Class 6	.	.	per Ton	Twopence.
" Class 7	.	.	per Ton	Three Halfpence.
For every Carriage in Class 8	.	.	.	The Charge specified in Table I.

TABLE IV.

*Maximum Charges for Small Packages and Single Articles of great Weight.***Small Packages :—**

For every Parcel not exceeding Seven Pounds in Weight	Sixpence.
" exceeding Seven Pounds, but not exceeding Fourteen Pounds, in Weight	Eightpence.
" exceeding Fourteen Pounds, but not exceeding Twenty-eight Pounds, in Weight	One Shilling.
" exceeding Twenty-eight Pounds, but not exceeding Fifty-six Pounds, in Weight	One Shilling and Threepence.
" exceeding Fifty-six Pounds, but not exceeding Five Hundred Pounds, in Weight, for the first Fifty-six Pounds	One Shilling.
And for every additional Fifty-six Pounds, or Fractional Part of Fifty-six Pounds, above the first Fifty-six Pounds	Sixpence.

Single Articles of great Weight :—

For every Boiler, Cylinder or Single Piece of Machinery, Timber or Stone, or other Single Article :

If weighing (inclusive of the Carriage) more than Four but not more than Eight Tons, Sixpence per Ton per Mile.

If weighing (inclusive of the Carriage) more than Eight Tons, such Sum as the Proprietors of the Railway think fit.

REGULATIONS.

Short Distance Charge.

1. For Passengers, Animals, or Goods conveyed on the Railway for a Distance less than that prescribed in the Certificate as the Short Distance, and if none is prescribed then for a Distance less than Six Miles, Charges are to be payable as for the Short Distance prescribed, and if none is prescribed then as for Six Miles.

Fraction of Mile; Passengers.

2. In respect of Passengers, every Fraction of a Mile beyond an integral Number of Miles is to be deemed a Mile.

Fraction of

3. In respect of Animals and Goods, for a Fraction of a

Mile beyond the Short Distance prescribed, or if none is prescribed then beyond Six Miles, or beyond any greater Number of Miles, Charges are to be payable in proportion to the Number of Quarters of a Mile contained in that Fraction; and a Fraction of a Quarter of a Mile is to be deemed a Quarter of a Mile.

Mile; Animals and Goods.

4. For a Fraction of a Ton Charges are to be payable according to the Number of Quarters of a Ton in that Fraction; and a Fraction of a Quarter of a Ton is to be deemed a Quarter of a Ton.

Fraction of Ton.

5. Every Passenger travelling on the Railway may, without Charge, cause to be carried in the same Train with him his ordinary Luggage, not exceeding the Weight prescribed in the Certificate, and if none is prescribed then not exceeding the Weight of One hundred and twenty Pounds for a First-class Passenger, One hundred Pounds for a Second-class Passenger, and Sixty Pounds for a Third-class Passenger.

Passengers' Luggage.

6. The Restriction as to Charges for Passengers does not extend to Special Trains when required by Passengers, but applies only to the Ordinary or Express Passenger or Good Trains appointed by the Proprietors of the Railway.

Special Trains.

7. Except as to Stone and Timber, Weight is to be determined according to Avoirdupois Weight.

Determination of Weight.

Fourteen Cubic Feet of Stone, and Forty Cubic Feet of Oak, Mahogany, Teak, Beech, or Ash, and Fifty Cubic Feet of any other Timber, are to be deemed One Ton, and so in proportion for any smaller Quantity.

8. In addition to the Charges in Table III., a reasonable Charge is to be payable for the loading, covering, and unloading of Goods at any Station, being a Terminal Station in respect of such Goods, and for Delivery and Collection, and any other Services incidental to the Duty or Business of a Carrier, where such Services, or any of them, are or is performed by the Proprietors of the Railway.

Terminal Station Charges.

A Station is not to be considered a Terminal Station in respect of Goods, unless they are received there direct from the Consignor, or are directed to be delivered there to the Consignee.

9. The Term small Packages does not include Articles sent in large aggregate Quantities, although made up of separate Parcels, such as Bags of Sugar, Coffee, Meal, and the like; but applies only to single Parcels in separate Packages.

Small Packages.

10. Nothing herein or in the Certificate contained is to prevent the Proprietors of the Railway from taking any Charge over and above the Charges herein-before limited for the Conveyance of Goods of any Description by Agree-

Agreement for higher Charges.

ment with the Owners of or any Persons in charge of such Goods, either in respect of the Conveyance thereof (except Small Packages) by Passenger Trains, or by reason of any other special Service performed by the Proprietors of the Railway in relation thereto.

(iv.) *Enactments in General Acts relating to Railways applied to Railways under this Act.*

Session and Chapter, and Section (if any).	Title or Short Title of Act.
1 & 2 Vict. c. 80. .	An Act for the Payment of Constables for keeping the Peace near Public Works.
1 & 2 Vict. c. 98. .	An Act to provide for the Conveyance of the Mails by Railways.
2 & 3 Vict. c. 45. .	An Act to amend an Act of the Fifth and Sixth Years of the Reign of His late Majesty King William the Fourth relating to Highways.
3 & 4 Vict. c. 97. .	An Act for regulating Railways.
5 & 6 Vict. c. 55. .	An Act for the better Regulation of Railways, and for the Conveyance of Troops.
5 & 6 Vict. c. 79, ss. 2 to 7 (both inclusive), and ss. 24, 25, 26. .	An Act to repeal the Duties payable on Stage Carriages, and on Passengers conveyed upon Railways, and certain other Stamp Duties in Great Britain, and to grant other Duties in lieu thereof; and also to amend the Laws relating to Stamp Duties.
7 & 8 Vict. c. 85. .	An Act to attach certain Conditions to the Construction of future Railways authorized or to be authorized by any Act of the present or succeeding Sessions of Parliament, and for other Purposes relating to Railways.
8 & 9 Vict. c. 3. .	An Act for the Appointment of Constables or other Officers for keeping the Peace near Public Works in Scotland.
8 & 9 Vict. c. 46. .	An Act for the Appointment of additional Constables for keeping the Peace near Public Works in Ireland.
9 & 10 Vict. c. 57, ss. 4, 6, 7, 8. . . .	An Act for regulating the Gauge of Railways.
10 & 11 Vict. c. 85, s. 16.	An Act for giving further Facilities for the Transmission of Letters by Post,

TABLE—(continued).

Session and Chapter, and Section (if any).	Title or Short Title of Act.
	and for the regulating the Duties of Postage thereon, and for other Purposes relating to the Post Office.
14 & 15 Vict. c. 64. .	An Act to repeal the Act for constituting Commissioners of Railways.
17 & 18 Vict. c. 31. .	The Railway and Canal Traffic Act, 1854.
18 & 19 Vict. c. 122, s. 6.	An Act to amend the Laws relating to the Construction of Buildings in the Metropolis and its Neighbourhood.
20 & 21 Vict. c. 31, s. 4.	An Act to amend and explain the Inclosure Acts.
21 & 22 Vict. c. 75. .	An Act to amend the Laws relating to Cheap Trains, and to restrain the Exercise of certain Powers by Canal Companies, being also Railway Companies.
22 & 23 Vict. c. 59. .	Railway Companies Arbitration Act, 1859.
26 & 27 Vict. c. 33, ss. 13, 14.	An Act for granting to Her Majesty certain Duties of Inland Revenue, and to amend the Laws relating to the Inland Revenue.
26 & 27 Vict. c. 112, s. 32.	The Telegraph Act, 1863.

(v.) *General Rules.**Form of Application.*

1. The Application to the Board of Trade for a Certificate is to be made by a Memorial in Writing, signed by the Promoters, or some or one of them, and lodged at the Office of the Board of Trade.

2. Together with the Memorial the Promoters are to lodge—

(a.) A printed Draft of the Certificate as proposed by the Promoters :

(b.) An Estimate of the Expense of the Construction of the proposed new Railway or Work (if any), signed by the Person making the Estimate.

Plans, Sections, etc.

3. Maps, Plans, Sections, and Books of Reference deposited by the Promoters are to be such, in respect of Scale and Contents and otherwise, as, under the Standing Orders of either House of Parliament for the Time being in force, they would be obliged to deposit if they were proceeding in the same Case by a Railway Bill.

4. The Maps, Plans, Sections, and Books of Reference aforesaid are to be deposited at the Office of the Board of Trade at the Time when the Memorial is lodged there.

5. They are also to be deposited for public Inspection at the same Offices of the Clerks of the Peace or Sheriff Clerks, at which, under the Standing Orders aforesaid, the Promoters would be obliged to deposit them if they were proceeding in the same Case by a Railway Bill.

6. Where any Part of the Railway will be situate within the Limits of the Metropolis, as defined by The Metropolis Management Act, 1855, a Copy of so much of the Plans and Sections as relates to that Part is to be deposited at the Office of the Metropolitan Board of Works.

7. A Copy of so much of the Plans and Sections as relates to each Parish in which any Part of the Railway will be situate, or in which any Lands intended to be taken for the Railway are situate, together with a Copy of so much of the Book of Reference as relates to that Parish, is to be deposited for public Inspection with the Officer or Person with whom, under the Standing Orders aforesaid, the Promoters would be obliged to deposit the same if they were proceeding in the same Case by a Railway Bill.

Advertisements as to Application.

8. After all the Deposits aforesaid have been made, Notice of the Application to the Board of Trade is to be given by Advertisement published as follows, namely :

Where the Railway will be situate wholly in One County, City, or Town, or County of a City or Town, then once in each of Three successive Weeks in some One and the same Newspaper of that County, City, or Town, or County of a City or Town :

Where the Railway will not be situate wholly in One County, City, or Town, or County of a City or Town, then once in each of Three successive Weeks in some One and the same Newspaper of the County, City, or Town, or County of a City or Town, wherein the Head Office of the Promoters is situate, and also once in each of Three successive Weeks in some One and the same Newspaper of each County, City, or Town, or County of a City or Town, wherein any Part of the Railway will be situate :

If in any Case there is not any such Newspaper as herein-before described, then in like Manner in a Newspaper of some adjoining or neighbouring County :

In every Case, once at least in the London, Edinburgh, or Dublin Gazette, respectively, if the Railway will be situate wholly in England or Scotland, or in Ireland ; and both in the London and in the Edinburgh Gazette, if the Railway will be situate partly in England and partly in Scotland.

9. The Advertisements are to be published either in the Month of June or in the Month of November and not at any other Time.

10. Each Advertisement is to give the Address of an Office in London where Copies of the Draft Certificate will be supplied as herein-after directed.

11. Each Advertisement is to state that all Persons desirous of making any Representation to the Board of Trade, or of bringing before them any Objection, respecting the Application, may do so by Letter addressed to the Secretary of the Board of Trade, on or before the First Day of August or First Day of January next succeeding the Date of the Advertisement, according as the same is published in the Month of June or in the Month of November.

Deposit of Copies of Advertisements.

12. Within One Week after the Publication of the latest Advertisement, a Copy of each of the Newspapers and Gazettes containing the several Advertisements is to be lodged at the Office of the Board of Trade.

13. Within the same Time, a printed Copy of the Gazette Advertisement is to be deposited for public Inspection in each of the same Offices, and with each of the same Officers and Persons, in which or with whom the Maps, Plans, Sections, and Books of Reference or Parts thereof were deposited.

14. The last-mentioned Deposit of a Copy of the Gazette Advertisement may be made (if the Promoters choose) by means of a registered Post Letter, and any Deposit so made shall be deemed made on the Day on which such Letter would be delivered in ordinary course of Post.

Note of Time of Deposit.

15. Where any Document is deposited under these Rules for public Inspection, the Clerk of the Peace, Sheriff Clerk, or other Officer or Person, in whose Office or with whom it is deposited, is to make thereon a Memorial in Writing denoting the Time at which it was deposited.

Notice to Road Trustees.

16. Where any Part of a Turnpike Road or Public Highway is intended to be taken or used, or to be diverted or otherwise interfered with, for the Purposes of the Railway, the Promoters in the Month of June or November (as the Case may be) in which the Advertisements are published are to serve Notice of the Application on the Trustees or other Persons having the Management of such Road or Highway.

Notice of Opposition.

17. Notice of Opposition by a Railway or Canal Company is to be lodged at the Office of the Board of Trade, not later than the First Day of August or First Day of January next succeeding the

Date of the Advertisement of Application, according as the same is published in the Month of June or in the Month of November.

Notice of Settlement of Draft Certificate.

18. On the Draft Certificate being settled by the Board of Trade, the Promoters are to serve a Copy thereof, with a Notice that the Draft has been settled by the Board of Trade, on every Company, Body, or Person, by whom any Representation or Objection respecting the Application was made to or brought before the Board of Trade, and are also to give by Advertisement or otherwise such public or other Notice (if any) thereof, as according to the Circumstances of the Case the Board of Trade direct.

Supply of Copies of Draft Certificate.

19. From the Time of the Publication of the first Advertisement the Promoters are to keep in the Office mentioned in this Behalf in the Advertisement, a sufficient Number of Copies of the Draft of the Certificate as proposed by them, and are to furnish there Copies to all Persons applying for them at the Price of not more than Sixpence each.

20. From the Time of the Settlement of the Draft Certificate by the Board of Trade, the Promoters are to keep in the Office aforesaid Copies of the Draft supplied to them for that Purpose by the Board of Trade, and are to furnish there Copies thereof to all Persons applying for them at such Price (if any) as the Board of Trade from Time to Time direct.

Deposit of Money.

21. The Deposit of Money or Government Securities in Court is to be made within One Month after Notice from the Board of Trade that they are prepared to issue the Certificate.

Printing of Certificate.

22. Copies of the Certificate printed by the Printers of a Gazette are to be printed on ordinary White Folio Paper, similar in Size to the Paper on which the Public General Acts of Parliament are printed for public Sale.

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